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The 1932 Annual Meeting

FOUR organizations are to act as hosts of the Annual Meeting for 1932 of the American Bar Association, according to Mr. Frank S. Bright, chairman of the Publicity Committee of the District of Columbia Bar Association. Mr. Bright adds the following details:

These host organizations are the Women's Bar Association of the District of Columbia and the Bar Association of the District of Columbia, both entirely local; the Federal Bar Association consisting of a large local membership and a wide membership throughout the country, and the American Patent Law Association, also with a wide national membership as well as its local membership.

These four groups have a local membership of well over two thousand, nearly all of whom are also members of the American Bar Association, so it will be seen that the resident members of the host organizations form the nucleus for a large meeting of the American Bar Association. The first thought of the host associations is that they are really to be hosts, and however much they may enjoy the annual meeting their first purpose will be to see to it that the guests coming to Washington shall have as fine a time as can possibly be given them.

Two arguments were used by the representatives of the host associations in presenting Washington's invitation for this year's meeting of the American Bar Association. The first, that this is Bicentennial Year, the second that the cornerstone of the Supreme Court building is to be laid on the 13th day of October of this year.

For several years the Bicentennial Commission under the efficient supervision of Hon. Sol Bloom and with the active cooperation of representatives of the District of Columbia has been planning for the proper observance of the Two Hundredth Anniversary of the birth of George Washington, not only in this his name city but throughout the United States and the world. A representative of the Bicentennial Commission cooperated in the presentation of the invitation to the American Bar Association and the Commission will continue to co-operate to make the meeting a success in every way in which the Commission and its members and representatives can contribute.

It seems curious that the greatest court in the world should never have had a building of its own but should always have been housed in cramped quarters—for more than 125 years in the Capitol Building. That condition is being changed as rapidly as possible and the future home of the Court, having been provided for by Congress, is already in process of erection. The Superintendent of Construction has assured representatives of the local host associations that the cornerstone will be ready to be laid by the 13th of October and the Superintendent of the Capitol, who is a member of the Commission for the erection of the court building, believes that in the fall of 1934 the Court can sit in the new building.

The erection of a separate building for the Court was brought about on the initiative of the late beloved Chief Justice Taft, who for many years had thought that the Court needed a more dignified setting than it now has.

Simple and impressive ceremonies are in process of arrangement for the laying of the cornerstone on the morning of the 13th of October, in which the Court will participate and in which also *all members of the American Bar Association who attend the annual meeting will be expected to take part.*

This of itself ought to inspire many to come

to the annual meeting, because never again in the lifetime of anybody living will a new Supreme Court Building have to be erected. It is possible that many of the members who come to Washington might desire to be enrolled as members of the Bar of the Supreme Court of the United States and this can be done for those who are qualified under the rules. A letter addressed to the Clerk of the Supreme Court of the United States will bring to those asking, the forms and a copy of the regulations relating to the admission of attorneys.

Recently one member of the Bar of the Supreme Court has been celebrating in a very private way the fact that he and his father and his grandfather have been continuously members of the Bar of the Supreme Court for one hundred years. It is a fine thing to be either an ancestor or an heir of such a line.

Plans are in the making for the entertainment of the members of the Association who come to the annual meeting. As rapidly as they are perfected they will be announced in the JOURNAL, but at this time it is not possible to do more than to say that there are in contemplation possible expeditions to Gettysburg, Fredericksburg and Annapolis for those who may be interested in Colonial or Civil War history. It is virtually certain that there will also be one large evening reception for members and the other guests of the host associations but the plans for this have not yet definitely been worked out.

In one or more of the future issues of the JOURNAL, in addition to a detailed statement of the plans for entertainment, some of the places in Washington which are of peculiar interest to members of the Bar will be set out more in detail.

Decisions on the "Flexible Tariff Act" of 1922

THE "flexible tariff provisions" of the Tariff Act of 1922 were the subject of five important decisions handed down by the United States Court of Customs and Patent Appeals on May 2.

In United States vs. Fox River Butter Co. the Government on appeal challenged the correctness of the judgment of the court below in sustaining the protest of an importer against an increase of rates on certain kinds of cheese and in holding unconstitutional the provisions of section 315 of the Tariff Act of 1922 conferring upon the President of the United States the authority to "determine and proclaim the changes in classifications or increases or decreases in any rate of duty," necessary to equalize the differences in the cost of production of like or similar articles produced in the United States and in competing foreign countries. In Fox River Butter Co. vs. the United States, a cross appeal, the importer contended that if the court erred in holding this section unconstitutional, it also erred in not holding that the President had no statutory authority to increase the minimum ad valorem rate, and in not holding that the Tariff Commission had failed to make an investigation as required by statute. It contended further that the President "had no authority to change the language of a paragraph of the Tariff Act," and that, by increasing the rate of duty on "cheese by whatever name known, having the eye formation characteristic of the Swiss or Emmenthaler type" when the Tariff Act itself provided for a duty on "cheese and substitutes therefor"—he had done more than raise the rate of duty; he had written an entirely new paragraph.

Addressing itself to this last objection first, the United States Court of Customs and Patent Appeals pointed out that "A large majority of the dutiable paragraphs of the 1922 Tariff Act contained one or more provisions, each of which covered many articles at the same rate of duty. Accordingly, if the President lacked authority to describe the particular article or articles on which the rates of duty were to be increased or decreased, the increased or decreased rates, as to each of those paragraphs, would have applied to all, or to none, of the articles covered by a provision fixing the rate or rates of duty. Obviously it was not the purpose of the Congress to require the President to change the classification, or increase or decrease the rates of duty, on *all* articles covered by a tariff provision, bearing the same rate or rates of duty, in order that the differences in the cost of production of *one or more of such articles* might be equalized.

"If the provisions of the statute in question were intended to be given any force and effect, the power to change the classifications, or to increase or decrease the rate or rates of duty, must have carried with it the power to describe the articles on which the rate or rates of duty were to be increased or decreased. Such power was not legislative in character. It was but the necessary means to carry out the constitutional and 'intelligible plan' of the Congress. (Hampton Jr. & Co. vs. United States, 14 Ct. Cust. Appls. 350, T. D. 42030, 276 U. S. 394.)

"It is argued by counsel for the importer," the opinion continues, "that the issues before this Court, and the Supreme Court, in the *Hampton* case concerned merely the power of the President to change a rate of duty, and that the involved issues were not considered in that case. Although the power of the President to describe the particular article or articles on which a change of classification, or an increase or decrease in the rate or rates of duty, was applicable, was not discussed by this Court, nor by the Supreme Court, in that case, nevertheless such power was so plainly necessary, if the 'intelligible plan' of the Congress was to be carried out, that it must have been given consideration."

In other words, the statute authorized the President to issue the proclamation as he did; and such authorization was not an unconstitutional delegation of legislative power, under the authority of the *Hampton* case, decided by the United States Supreme Court on April 9, 1928.

Taking up the other questions involved, the Court held that the President had the authority to raise the minimum ad valorem rate as well as the specific duty. Counsel for the importer had contended that "the minimum 25 per cent ad valorem rate provided in paragraph 710 was merely a revenue raising rate, and was not intended to equalize the differences in the production costs of foreign and domestic cheese; and that, therefore, the President had no authority to increase it for the purpose

of equalizing the differences in such costs." However, the contention was rejected.

In connection with another contention of the importer, the Court explained the position occupied by the report of the Tariff Commission in the process of equalization contemplated by the "Flexible Tariff Provisions." It is true, it pointed out, that Sec. 315 provides that no proclamation shall be issued by the President until an investigation is made by the commission. But this is expressly declared to be "to assist the President in ascertaining differences in costs of production," and though such an investigation is necessary to give the President authority to act, "on the final analysis the duty devolves on the President to make the findings contemplated by the statute."

In reply to argument of Counsel for the Government that neither the Court below nor the Court of Customs and Patent Appeal had authority to review the acts of the President or those of the Tariff Commission, inasmuch as the statute did not expressly so provide, the Court pointed out that under section 315 a legal investigation by the Tariff Commission is a condition precedent to the issuance of a lawful proclamation by the President. Accordingly, if he had acted without such a prior investigation, on protest being made, the Court below and the Court of Appeals had authority to determine the issues raised thereby. "The Congress of course," it continued, "contemplated that the Tariff Commission would make full, fair and impartial investigations to the end that the President might be fully advised and the purposes of the law consummated. Nevertheless, neither the Customs Court nor this Court was given authority to revise the proceedings of the commission, nor to control the scope of its investigations. However, the Customs Court and, on appeal, this court has authority to review those proceedings for the purpose of determining whether a legal investigation has been made."

The judgment of the court below was accordingly reversed, as was also that in the United States vs. Harry Blandamer, involving the same principle of the President's right to describe the particular articles with reference to which he acted; also United States vs. S. Leon and Co., involving, among other questions, the admissibility of a Report of the Tariff Commission in evidence. In William A. Foster and Co. vs. the United States, decided at the same time, the Court held that the legality of the Presidental order and proclamation may be questioned by protest, under section 514, "'if the President, in operating under this section, [315] goes beyond, or contrary to, or without the observance of, the limitations and conditions of section 315." And in Norwegian Nitrogen Products vs. the United States the Court, in discussing the kind of investigation which the Tariff Commission is instructed to make, says that it is not one which is similar to and comparable with a hearing in a judicial tribunal where vital rights are at issue. "The whole argument made by counsel for appellant," the Court said, "would seem to rest upon the fact that his client had not been granted such a hearing as it was entitled to in order that its rights be protected under the due process clause of the Constitution. For a number of reasons we conclude that this position cannot be successfully defended." The two last named cases were affirmed.

There is, of course, a new "Flexible Tariff Act" in effect at present, that of 1930, but the above decisions as to the Tariff Act of 1922 will no doubt be found to have significance in future litigation under the later Act.

To the Members of the American Bar Association

THE Committee on American Citizenship begs to announce that the American Legion will cooperate with this Association and other patriotic bodies in the celebration of Constitution Week and continuously thereafter.

Russell Cook, National Director of the Legion, has prepared a program of five daily addresses during the week as follows:

Monday—Purpose and cause of drafting and signing the Constitution.

Tuesday—The history of the signing of the Constitution and the necessity of such a document for our form of government.

Wednesday—The Legislative Department.

Thursday—The Executive Department.

Friday—The Judicial Department.

This is an admirable program and the Legion desires the cooperation of the members of this Association to make their program effective. Naturally, they will have to draw on the Bar, and particularly the members of this Association, to a large extent for their speakers. We have taken the liberty to pledge the cooperation of this Association to that extent and we earnestly request the members of the Association wherever there is a Legion Post to prepare themselves for this service. We especially urge this upon the younger members of the Association. If a young lawyer is able to deliver an address on the fundamental instrument of his government, his people would naturally infer, and rightly so, that he has also studied its laws.

This great body with its patriotic past, its loyalty, and its ideals for the future is the most effective auxiliary that has yet come to us. Let us welcome its aid by coming to its assistance.

F. DUMONT SMITH,
Chairman, Committee on American Citizenship.

Mississippi Legislature Passes Organized Bar Act

THE Mississippi Legislature passed, and the Governor, on April 30, approved "An Act to provide for the organization, regulation and government of the Mississippi State Bar, to require all lawyers now or hereafter practicing law within this State to become members of the Association created hereunder, and to define the powers and duties of such Association."

Section 4 of the Act provided that the first Board of Commissioners should be appointed by the circuit judges, each judge naming one from his circuit, and that the Board thus created should hold office for one year from the date of the organization meeting provided for in a later section. In the exercise of this authority, the judges appointed the following members, who later met and perfected their organization: W. W. Venable, Clarksdale; W. G. Roberds, West Point; Ben H. McFarland, Aberdeen; W. D. Hilton, Mendenhall; F. E.

Everett, Indianola; R. M. Kelly, Vicksburg; C. E. Johnson, Union; Geo. W. Currie, Hattiesburg; J. D. Guyton, Kosciusko; D. C. Bramlett, Woodville; John Kyle, Sardis; John L. Heiss, Gulfport; Lee D. Hall, Columbia; C. C. Dunn, Meridian; Fred B. Smith, Ripley; J. H. Price, Magnolia; Louis M. Jiggitts, Jackson.

Future regular elections of members of the Board of Commissioners are to be at the Annual Meetings, where the lawyers from each judicial district will assemble separately and elect a member for that district. The Board is given the power, subject to the approval of the Justices of the Supreme Court, to formulate rules governing the conduct of all persons admitted to practice. It is given the customary power to investigate complaints of unprofessional conduct, and also required to render advisory opinions, on the written request of any member of the Association, as to the validity or propriety of any proposed act or course of conduct. Violation of the rules of conduct is to be dealt with, as a rule, after proper investigation, by proceedings in the circuit or chancery court of the county in which the accused resides. However, where the Board feels that the violation calls for a mere reprimand, it is authorized to make it without instituting court proceedings.

There are also provisions for proceedings to secure reinstatement by one who has been disbarred, with a right to appeal to the Supreme Court on the part of the applicant and the Board of Commissioners, when either deems it advisable.

Story Hour in a Law Office

A MEMBER of the Association residing in an eastern state sends us an account of a somewhat novel scheme to "take in" innocent and unsuspecting lawyers. He suggests that a note in the Journal might serve to put such lawyers on their guard against this particular fraudulent attempt. The account follows:

"Several months ago, a man approximately 45 years of age, weighing about 150 pounds, and wearing horn-rim glasses, appeared at a local bank and asked to be recommended to an attorney with whom he could entrust a considerable sum of money. The party came to this office and said that he was Franky Lake of a Chicago gang of beer barons; that he was 'on the outs' with his associates, and that they were attempting 'to put him out of the way' because he was arranging with the government for a settlement of an income tax. He referred to his associates as Ralph Capone, Terry, and others.

"The story finally leads up to the fact that he has a million dollars in currency in safety deposit boxes in various banks in Chicago. He names the banks, gives the box numbers, and says that the keys are with a girl friend in Wisconsin. He offers to pay a considerable sum of this money if an attorney will act as an intermediary, meet his girl friend, obtain the safe deposit keys from her, get the money, and make payment to the authorities in Washington of the income tax of approximately $190,000.00. He finally states that he is without funds and has been traveling a great distance to get away from his former associates and requested in advance sufficient to enable him to go to Cuba where he will go into hiding. While making the proposition in this office, a photograph of Franky Lake was obtained from the local police authorities, which disclosed that he was not the Franky Lake of Chicago. He became suspicious and left.

"We have since learned that he has been working the same plan in Massachusetts, but we have been unable to determine whether or not any money was advanced to him. His telling of his story requires an hour or more of your time, and he was very impressive. We attempted to check him up on his residence, but he was very familiar with the Chicago territory and could point out on the map the various roads in the state of Wisconsin and the location of his elaborate home."

Presidential Appointments to Speak

ON May 22 President Thompson is scheduled to address the Wisconsin Bar Association at Oshkosh. Later engagements are for an address to the Indiana Bar Association, at South Bend, on July 7; the Minnesota Bar Association at Minneapolis on July 8; and the North Carolina Bar Association at Asheville on July 15.

During the past few months President Thompson has delivered addresses before the Florida, Arizona, Oklahoma, Nebraska, Alabama, Texas, Arkansas, New Jersey, and Iowa Bar Associations, and also to associations in Cincinnati and Boston. On June 8 he delivered an address at the University of Missouri Commencement at Columbia, and on June 9 he addressed the students at Northwestern University, Chicago.

Arrangements for the Fifty-Fifth Annual Meeting

Washington, D. C., October 10-15, 1932

Section Meetings, Monday and Tuesday, October 10 and 11.

General Sessions, Wednesday, Thursday and Friday, October 12, 13, 14, 1932.

Annual Dinner Saturday evening, October 15.

HEADQUARTERS: Hotel Mayflower, Connecticut Avenue.

Hotel accommodations are available as follows:

	Single (For 1 Person)	Double (For 2 Persons)	Twin Beds (For 2 Persons)	Parlor Suites
Carlton	$5-6-7	$8	$9-10	$15-20-25
Hay-Adams	$4	$6-8	$10	$12 and up
Mayflower*	$7	$9	$9-10-12	$17-18-22-24 for 2 persons ($2 less for 1)
Powhatan	$3.50-4-5	$6	$7-8	$12-15
Raleigh	$3.50-4-5	$5-5.50-6.50	$7-8-9	$12
Shoreham	$5	$8	$12	$12-15
Wardman-Park	$5	$7	$8	$10 and up
Washington	$5-6	$7-8	$8-10	$18 and up
Willard	$4-5-6	$6-7-8	$8-9-10	$17 and up

Reservations will be made at other Washington hotels upon request.

*The allotment of $5 and $6 single rooms and $8 double rooms has been exhausted.

Explanation of Type of Rooms

A single room contains a single or double bed to be occupied by one person. A double room (same type as mentioned in preceding paragraph) containing a double bed may be occupied by two persons, at an additional charge of $2.00.

A twin-bed room contains two single beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with parlor.

Each and every room has tub and/or shower bath.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number and rate for rooms required, names of persons who will occupy the same, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

The allotment of single, double and twin-bed rooms at the Mayflower Hotel will very shortly be exhausted. It is suggested, therefore, that in making requests for reservations, members specify a second choice from the hotels listed, so that reservations may be made promptly and without additional correspondence.

Reservations should be made as early as possible. Requests should be addressed to the Executive Secretary, 1140 North Dearborn Street, Chicago, Illinois.

Reduced Rates for the Washington Meeting

The usual arrangement enabling members attending the meeting to secure a reduction of 25% from the round trip rate will be made with the Passenger Associations, and Individual Identification Certificates will be distributed to members of the Association in advance of the meeting. A more detailed announcement will appear in the next issue of the Journal.

National Conference of Commissioners on Uniform State Laws

The next Annual Meeting of the Conference will be held at the Hotel Mayflower, Washington, D. C., beginning Tuesday, October 4, 1932. Applications for hotel reservations should be made to the Executive Secretary of the American Bar Association, 1140 North Dearborn Street, Chicago, Illinois.

St. Louis Bar to Continue Pre-Primary Referendum

(From St. Louis Post-Dispatch, April 12)

The St. Louis Bar Association last night rejected a committee's recommendation to discontinue participation in judicial primary elections. It voted decisively to continue the pre-primary referendum as conducted in 1928 and 1930, as well as the pre-election referendum on judicial nominees.

Judicial candidates, as designated by the association, include Circuit Judges, Probate Judge, Judge of the Court of Criminal Correction, Circuit Attorney and Prosecuting Attorney.

The Committee on Nomination of Judicial Candidates had recommended discontinuance of the pre-primary referendum on the ground that its continuance might subject the association to an imputation of participation in party politics and that candidates indorsed in the pre-primary, but not in the pre-election referendum might be embarrassed.

THE FEDERAL JURISDICTION AND RECENT ATTACKS UPON IT

The Fundamental Conceptions of Natural Rights and Divided Sovereignty in Our Constitution Would Mean Nothing without an Institution to Make Them Effective—Important Role of the Judiciary — Typesof Men Who Would Strike It Down—Forms Which Their Attacks Have Taken in the Past—One Which Is Fraught with Real and Immediate Danger—Fallacious Arguments Adduced in Support of Attack on Jurisdiction Based on Diversity of Citizenship, etc.*

By Hon. John J. Parker
Judge of the United States Circuit Court of Appeals, Fourth Circuit

I ESTEEM it both a pleasure and an honor to be invited to address this Association. The lawyers of this state have an inspiring history. Before David Dudley Field had commenced his great work of codification, Georgia had blazed the way for this reform and had codified successfully not only the adjective but also the substantive law. As one who is interested in the reform of procedure and who believes that the law should be, not a musty collection of rules and forms and precedents, but the living instrumentality of justice, I rejoice to be with the lawyers of the state that first among English speaking peoples adopted a modern and simplified system of procedure. I am happy, too, to be in a state which has contributed so many great figures to the profession of the law. When I think of the lawyers of Georgia, I think not only of those who are adding luster to the bench and bar of today, my friends Judges Sibley and Russell and Gilbert, and a host of others whom I know and love and respect; but I think also of the great figures who have added glory to this bar in the past—Judge Nisbet and Judge Cobb, William H. Crawford, Alexander H. Stevens, Mr. Justice Lamar. I feel that their spirits still linger here and that their presence adds to the dignity of all of your deliberations.

Your invitation came to me at a time when I was much interested, as a member of the Committee on Jurisprudence and Law Reform of the American Bar Association, in a number of bills which had been introduced into Congress attacking the jurisdiction of the lower federal courts. I do not wish to "talk shop"; nor do I desire to put myself as a federal judge in the attitude of assuming any pride or importance of position. On the other hand, because of my experience on the federal bench, I feel that I can speak with some authority as to the federal jurisdiction; and, because of the determined and concerted attacks which are being made upon that jurisdiction at this time, I feel that there is no more important subject upon which I could address you. With your permission, therefore, I shall speak briefly of our federal jurisdiction, of the attacks which are being made upon it, and of the importance of its preservation.

The judiciary under our federal Constitution occupies a position of peculiar importance. It is the keystone of the arch of constitutional government. In every country the judge is more than a mere arbitor of disputes. It is his peculiar function to interpret the law for his people—to bring "wisdom and the will of God" out of the heavens to dwell in the affairs of men—to interpret the principles of the life of his times in terms of rules by which men and society may safely live. But in America his function goes beyond even this. He must be a statesman as well as a lawyer. He must apply to changing conditions the principles embodied in the written constitution, which is the basis of our national life.

Many who speak of constitutional government do not, I think, correctly grasp the conception which it embodies. It is a governmental structure, characterized by checks and balances on the powers of governmental agencies, the purpose of which is to overcome the defects and dangers inherent in popular government and to make such government workable. For ages men have dreamed of democracy; but, until the birth of the American Republic, democracy was little more than a dream. A fatal weakness which everywhere afflicted it was the tyranny and destructive power of temporary majorities. Another weakness thought to be insuperable was the difficulty of obtaining a workable expression of the popular will over a wide territory among a people with widely divergent customs and ideals. Hence philosophers taught that democracy was suited only to small and sheltered communities and could never work successfully in a great nation. By our system of constitutional government we have met these objections and overcome these weaknesses. This system has embodied three great conceptions: (1) the protection of the rights of the individual against the power of government; (2) the division of the powers of sovereignty between the governments of the state and the nation; and (3) a judiciary to stand as a bulwark between the individual and the state and to hold the general and local governments within their proper spheres of activity.

The first of these conceptions is fundamental in Americanism. Our fathers through the centuries in England had built up a conception of certain natural rights as belonging to the individual, which he might assert against the power of the crown—freedom of thought, freedom of speech, freedom of

*Address delivered before the Georgia Bar Association at Albany, Ga., June 3.

action—the right of the people to be secure in their houses, persons and effects from the unreasonable exercise of governmental force in searches and seizures—the right not to be deprived of life, liberty or property but by the law of the land, the general law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. These and others of which I need not speak embodied the Englishman's conception of individual liberty. In our Constitution we guaranteed these not against the executive alone, but against the entire power of the general government, and forbade the states to pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts. Later when we made citizenship a national matter under the Fourteenth Amendment, we forbade any state to deprive any citizen of life, liberty or property without due process of law. The result of this amendment, together with the original provisions of the Constitution, was to erect a barrier protecting the rights of individuals from aggression by governments, state or national; so that no powerful organization, no popular majority, not even the whole people, might deny the fundamental rights of the individual to any citizen, however humble or however unpopular. This I think, has been America's greatest contribution to the science of government. It has erected a barrier against that tyranny of demagogues and temporary majorities, which has been the ruin of popular governments in the past; it has guaranteed to the individual the enjoyment of his liberty and the fruits of his labor and his genius; and it has given a dignity and a stability to the status of a citizen never before attained under any government.

With this came another constitutional conception of almost equal importance—the principle of dual sovereignty. Our Constitution, while recognizing in the several states the right to govern themselves in matters of local concern, has given to the federal government sovereign power in matters of general importance, so that it may not only perform national functions in dealing with foreign peoples but may also regulate the dealings between the peoples of the various sections, do justice between them in their sundry disputes, and thus build up a spirit of unity and nationalism throughout the Union, without which, of course, no national existence would long be possible.

But these great conceptions of natural rights and divided sovereignty would mean nothing without an institution to make them effective. This brings us to the third great conception of our constitutional structure—a judiciary with power, not merely to decide private disputes and interpret and apply statutes, but with power also to protect the rights of individuals against improper or oppressive legislative or executive action of the state or national governments and to hold these governments within their constitutional bounds of activity. When a government, state or national, denies to any individual his rights under the fundamental law, or when the national government encroaches upon the domain of the states or the states upon the domain of the national government, the duty devolves upon the judiciary to enforce the provisions of the Constitution; and in a series of great decisions beginning away back with Calder v. Bull and Marbury v. Madison and coming on down through Gibbons v. Ogden, McCulloch v. Maryland, Cohens v. Virginia, Ex Parte Milligan, Myers v. The United States, not to mention others of more recent date, the judiciary has risen to the performance of this great duty, and has given us for the first time in history, I think, a government which is in truth a government of laws and not a government of men.

But while the judiciary established by our constitutional system is, in my humble judgment, essential to the preservation of the system itself, it has from the first, because of the very nature of the function which it is called upon to perform, been subjected to almost constant attacks. It was attacked by the radical element in the state conventions which adopted the Constitution. It was attacked in the days of Marshall. And it is attacked today by the same classes that have always attacked it—by men who at heart have no sympathy with our constitutional system and who would strike down the power of the judiciary because they realize that therein lies the power of that system. Let us see who these are.

First, there are those who believe in direct as distinguished from representative popular government. The American system is the representative system. We believe that government should represent the popular will; but we believe that the popular will can better be determined by the deliberate action of the people's representatives than by holding elections on matters of legislative or judicial cognizance. This philosophy of government, however, is not of universal acceptation in this country. There are those who believe in direct popular action, and they have made quite an inroad on our institutions. By their multiplication of elective offices, they have weakened the executive departments of state and local governments. By their initiative and referendum, they have weakened the legislative systems of many states. By their election and recall of judges, they have thrown many state judicial systems into politics and have weakened local judiciaries. The adherents of this school of thought oppose the judicial system of the federal government because of their desire to subject judges to the control of popular majorities, and because of their belief that the judiciary should not have the power to declare unconstitutional legislation which popular majorities may force through legislatures.

Next are the socialists and near socialists and the leaders of organized blocs, who desire to strike down the constitutional guaranties of individual rights, and who recognize in the courts the strongest bulwark of the rights of the individual. As social life in America has become more complex, social interests have become more and more important and the functions of government have expanded to meet social needs. In the minds of some the social and class interests have become so important as to crush out all regard for the rights of the individual; and these are impatient of any institution which stands in the way of their cherished plans for the reorganization of society. They fail to realize that the greatness of America has resulted not so much from social organization as from individual freedom; that socialism means not freedom and opportunity to the individual but state slavery which cramps and starves his life and closes in his face

the door of opportunity; that slavery is slavery, whether the master be an individual or a bureau or committee of the state.

A third class is composed of those who, knowing little of the philosophy of government, are opposed to what they imagine is undue power vested in officials who hold office during life or good behavior. As Hamilton pointed out in the Federalist, it is absolutely necessary that the kind of power vested in the federal judiciary be placed in men removed from the vicissitudes and temptations of politics. In standing between the rights of the individual and laws enacted by the people's representatives, or in passing upon conflicting rights of the states and the general government, they must have an eye single to the principles of the Constitution and not be dependent for their tenure of office upon popular approval. To secure the right sort of men to discharge the delicate function which they are called upon to discharge, moreover, there must be permanency of tenure. Men of the ability desired would not be willing to surrender a lucrative practice at the most remunerative period of their professional experience, if there were danger that through the chances of politics they would be thrown out of their positions to pass an old age in penury. These arguments, however, do not appeal to some, who look with a jealous eye upon what they wrongly imagine is an official class clothed with life tenure and arbitrary power.

The attacks of these persons upon the federal courts take a number of forms. The one which has been made from time to time since the foundation of the government is upon the peculiar power under our constitutional system of declaring acts of the Congress and the state legislatures unconstitutional. Sometimes this attack is simply a denial that the power exists. Sometimes it is a proposal to limit the exercise of the power to the Supreme Court. Sometimes it is a proposal to require a unanimous decision of the Supreme Court or a two-thirds majority as a condition of its exercise. Sometimes it is proposed to subject decisions of the Supreme Court to review by the legislative branch of government or to recall by the people themselves. But whatever the form of the attack, the purpose is the same—to deprive the courts of the power of enforcing the provisions of the Constitution. I shall enter into no eulogy or defense of the power other than I have already done. Sufficient is it to say that without it this Republic could never have weathered the storms of the last century. The most bitter criticism of the power has been with regard to its effect on state legislation. But Mr. Justice Holmes with respect to this has said: "I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end."

Another attack which has never succeeded in getting very far is the attack upon the power of the federal judge. Those who distrust the judiciary have played havoc with the state courts in many of the states. Statutes have been passed making juries judges of the law as well as of the facts—statutes forbidding the judge to express an opinion on the facts or even to charge the jury except in the form of abstract written instructions—statutes allowing the juries to fix punishments, etc. These and others too numerous to mention have stripped state judges of their common law powers and have made trial by jury something entirely different from what it was at common law. And it is worthy of note that it is precisely in the states which have stripped the judge of his power over jury trials, that trial by jury has been the subject of the greatest criticism and there have been the loudest complaints of miscarriages of justice. I have not heard complaint of the jury system as administered in the federal courts or in the courts of England, where the common law safeguards are maintained. Statutes, however, having the same purpose as those to which I have referred have been introduced in Congress but have died there. It was probably realized that the constitutional provision which guaranteed trial by jury in the federal courts meant trial by jury as it existed at common law, i.e. by a jury charged and instructed by a judge.

But there is one attack which is fraught with real and immediate danger to the federal judiciary and, I think, to the country, and that is the attack on the jurisdiction of the lower federal courts. And against this attack, although argument is made to the contrary, it cannot be said with any assurance that the Constitution furnishes protection. The judicial power, it is true, is fixed and defined by the Constitution. Section 2 of article 3 provides that it shall extend "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Section 1, however, vests this judicial power in our Supreme Court and such inferior courts as Congress may from time to time ordain and establish. By the second clause of section 2 the Supreme Court is given original jurisdiction only of cases affecting ambassadors, other public ministers and consuls and cases to which a state is a party; and the original jurisdiction as to other cases lying within the judicial power is left to such other courts inferior to the Supreme Court as Congress may establish. The jurisdiction of these courts, therefore, rests upon the legislation of Congress. As said by Mr. Justice Sutherland in Kline v. Burke Construction Co. 260 U. S. 226, 234, "The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. . . . And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part."

The attack upon the federal judiciary, therefore, has been concentrated in an attack on the jurisdiction of the lower federal courts. In the 71st

Congress a bill was introduced stripping these courts of jurisdiction arising out of diversity of citizenship and also of the general class of cases arising under the Constitution and laws of the United States. This bill died with the last Congress, but into the present Congress a number of bills have been introduced. One of these would deprive the lower federal courts of all jurisdiction arising out of diversity of citizenship. Another provides that a corporation doing business within a state is for purposes of jurisdiction to be deemed a citizen of that state. Another raises the jurisdictional amount to $7,500.00. Another raises it to $10,000.00. Still another forbids the granting of injunctions by federal courts suspending the order of administrative boards of a state which fix the rates to be charged by public utilities. And there are others which I will not take time to mention. There can be no doubt that there is a determined effort to destroy the jurisdiction which the federal courts have exercised since the foundation of the Republic and to impair their power to enforce the provisions of the Constitution. It is not my privilege to advise with Congress as to legislation pending before it; but I feel that it is not only my right but also my duty to discuss with the members of the bar the principles involved in proposals affecting the judiciary, which, in my opinion, will impede the administration of justice, destroy the effectiveness of constitutional guaranties and hamper the development of our national life.

I shall speak but briefly of the proposal to withdraw the injunctive power in the matter of public utility rates. This power is exercised under the 14th Amendment which forbids that any state deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the laws. The state through its legislature or a public commission may fix the rates of public utilities; but it may not fix them so low as to involve confiscation of the property invested. When a rate is unreasonably low it is confiscatory of invested property, because the utility is required by law to render the service and can only charge the rate fixed. When, therefore, a state commission fixes such a rate it violates the constitutional guarantee contained in the 14th Amendment; and the power of the courts is invoked to enjoin its enforcement in protection of rights guaranteed by the Constitution. I see no reason why the courts of the United States should be denied the right to protect constitutional rights in this particular. It is said that the utility can and should go into the courts of the state, and thence, if aggrieved by their action, to the Supreme Court of the United States. The trouble with this is that a company may be financially ruined and its property virtually destroyed before it can reach the Supreme Court of the United States by the route of the state courts. Furthermore, the Supreme Court would then have to hear the case on the record made in the state courts. One of the criticisms of the federal jurisdiction in this matter is that the federal courts examine into the facts whereas in many of the states the record of the commission is held binding. If I know anything about jurisprudence, the objection states the strongest ground that could be stated in opposition to the conclusion which it is designed to support. Where a state commission is charged with fixing a rate which is confiscatory, the courts should make full inquiry into the facts and not rest their action upon findings of the commission which are attacked. And certainly it is of the gravest importance in such a case that the Supreme Court have the case before it in a record made by a court uninfluenced by local feelings and interested solely in seeing that constitutional requirements are enforced. As said by Mr. Justice Holmes in Prentis v. Atlantic Coast Line R. Co. 211 U. S. 210, 228:

"If the railroads were required to take no active steps until they could bring a writ of error from this court to the Supreme Court of Appeals after a final judgment, they would come here with the facts already found against them. But the determination as to their rights turns almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact. When those are settled the law is tolerably plain."

The importance of the record upon which review is to be had is obvious, but Mr. David E. Lilienthal, editor of "Public Utilities and Carriers Service" and contributor to the law reviews of Harvard, Yale and Columbia, thus emphasizes it in an article in 43 Harvard Law Review 379:

"The most outstanding difference is in the record upon which the reviewing courts base their conclusion as to the validity of the order. If the same commission order were under review in both a state and a federal court it is conceivable and even likely that the two courts would have wholly different records before them.

"Unless an adequate record is before the state supreme court when it reviews the commission order, effective appeal to the United States Supreme Court is out of the question. In those states in which review may be denied simply upon the representations in the petition for review and without the court having a complete record before it, state review is hazardous and resort to the federal court in the first instance a plain necessity."

Complaint has been made of delays in the federal courts in this class of litigation; but the state courts seem to offer no advantage in this particular. With respect to this and with respect to the scope of the relief granted, Mr. Lilienthal in the same article says:

"The facility and speed with which temporary relief may be obtained in a meritorious case is another important point of comparison. Assuming that the state statutes permit a stay of the commission's order, there seems little difference in this particular. The state courts will ordinarily issue a stay of the commission's order upon substantially the same kind of showing of threatened irreparable injury as move the federal courts to grant a temporary injunction. But there are three respects in which temporary relief in the federal courts is more effective, from the point of view of the complaining utility. (1) In the numerous jurisdictions in which state review is not available until application has been made to the commission for a rehearing the machinery of state review moves more slowly. Especially is this true where there is no time limit during which the commission must pass upon the application for rehearing. (2) The scope of temporary relief is broader, permitting of an immediate increase in rates. (3) The refusal of a state court to stay the commission's order, not being a final order, is not ordinarily open to review, whereas the Judicial Code expressly makes the refusal of a 3-judge court to issue a temporary injunction reviewable, and pending such appeal to the Supreme Court the 3-judge court may preserve the status quo.

"Federal review, as compared with that afforded by the state courts, has been criticized because of the time consumed in reaching a conclusion in these cases. After an examination of the reported opinions in a large number of cases in both the federal and state courts, we find it impossible to agree with this generalization. Our investigation shows no such clear line of distinction. While the elapsed time between the initiation and conclusion of some of the more important rate cases in the federal courts is almost incredible and a serious objection

to this form of review, state litigation is sometimes equally interminable.

"The scope of relief possible in the state courts is narrower than is available in the federal courts. For all the state courts are empowered to do, except those which act legislatively, is to affirm or set aside the commission's order, and remand the matter to the commission for further proceedings. Where the commission order reduces the company's rates from those previously charged, then of course the scope of relief afforded by a stay of such an order is amply broad. But suppose the utility has applied for an increase in rates, an increase which it regards as vital to its existence. A stay of this order would not permit the company to charge increased rates. There is cold comfort for a utility in a victory in the state Supreme Court if all that court may hold is that the commission's 3-year-old order denying the increase in rates was unlawful and should be set aside. During the period of the appeal the utility was suffering from an unlawful order, and for the consequent loss there is no way by which it can be reimbursed. With its hard-fought victory in hand it must then return to the commission, and again demand relief. And while the Supreme Court decision is authoritative as of the date of the commission's order, economic or social conditions may have so changed in the interim that the commission, exercising an honest and informed judgment, may conclude once more that relief should be denied."

If the state courts are willing to suspend the operation of an order which has been attacked pending the determination of its constitutionality, their right to proceed without interference by the federal courts is protected by existing law. The act of March 4, 1913, c. 309, added the following proviso to section 266 of the Judicial Code under which injunctions in this class of cases are granted, and same is now the law, viz.:

"It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the state having jurisdiction thereof under the laws of such state, to enforce such statute or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such state court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the state."

Certainly this is as far as we should go in denying to the federal courts jurisdiction in these controversies. If constitutional rights are to mean anything, the courts must have the power to protect them adequately. And the mere fact that property is dedicated to a public use, is no reason why it should be subjected to the danger of confiscation.

I come, then, to the attack on jurisdiction based on diversity of citizenship. The provision conferring this jurisdiction on the lower federal courts was contained in the Judiciary Act of 1789; and these courts have had the jurisdiction without interruption from that day to this. No power exercised under the Constitution has, in my judgment, had greater influence in welding these United States into a single nation; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into the various parts of the Union; and nothing has been so potent in sustaining the public credit and the sanctity of private contracts. Interstate commerce has grown to an extent that the framers of the Constitution could not have foreseen; interstate travel and communication have increased; and the flow of capital for investment across state lines has become an essential part of our national existence. And while it is true that these things have doubtless ameliorated local prejudices to some extent, they have also greatly increased the number and importance of the controversies between citizens of different states; and have rendered it a matter of prime importance that controversies affecting citizens of different sections shall be decided by tribunals of a national rather than a local character—courts which represent the people of all sections and which for that reason will command the confidence of the people of all sections. When life everywhere is expanding and becoming national in scope, it is no time to make the administration of justice a local matter.

One of the principal arguments in favor of jurisdiction based on diversity of citizenship is that its existence is essential to furnish the non-resident an impartial tribunal in which his controversy may be tried. This argument is as valid today as it was in 1787. I do not assert, I do not believe, that federal judges are men of higher character than state judges or that jurors in federal courts are more intelligent or more impartial as a general proposition. But there is this difference: the state trial judge is generally a local man with a local outlook. The federal trial judge has jurisdiction over a wide territory; he is part of a national judicial system and his action is subject to review as of right by a court having jurisdiction over a number of states. The jury in the state court comes from the county of the resident party: the federal jury is drawn from a wide territory and usually knows no more about the plaintiff and his attorney than about the defendant and his attorney. The question involved is not one upon which statistics of any value may be obtained. It is one which must be decided by men of experience in the light of the known facts of human nature. And no statistics are necessary to convince any lawyer of experience representing a non-resident client, that he will obtain a more impartial tribunal for his client under the conditions afforded by the federal courts than under those afforded by the courts of the state. You need only ask yourselves this: if one of you gentlemen were defending a citizen or corporation of Georgia sued in a rural county in the state of Kentucky or New York, would you prefer to try your case before the local county judge and before a jury composed of the fellow countymen of the plaintiff, or in the federal court where the judge has jurisdiction over half the state and where the jurors are drawn from a number of counties? There is but one answer to that; and you can rest assured that citizens of Kentucky or New York feel the same way about going into local courts in Georgia or North Carolina that we feel about going into local courts in their states.

And almost as important as having an impartial tribunal is having a tribunal which will proceed according to standard and approved methods. Every man who goes into a federal court in an action at law is guaranteed by the Constitution a trial by jury according to the course of the common law, that is, a jury which must take the law from the court and follow the court's instructions with regard thereto. In dealing with cases where one of the parties is a non-resident, frequently unpopular, the judge must have all of the powers of a judge; he must have the power not only to charge on the law and apply it to the facts in evidence, but he must have the power also to comment on the testimony where occasion demands, to direct a verdict where the evidence is all one way and to set aside a verdict which is contrary to the evidence

or to good conscience. In the courts of many of the states the judge has been shorn of these powers. In some the jury have been made judges of the law as well as of the facts. In some the judge has been forbidden to charge upon the facts or to charge at all except in the form of written instructions embodying abstract propositions of law. In some he is forbidden to direct a verdict. To require a non-resident to try his case in such a tribunal is not only to turn him over to the tender mercies of a local jury without power in the presiding judge to counteract the appeals to prejudice of local counsel, it is also to deny him the kind of trial by jury which under the Constitution he has the right to expect. Opponents of the jurisdiction based on diversity of citizenship say that when the jurisdiction in the lower federal courts is withdrawn by Congress, the state courts will exercise the jurisdiction which Congress has the power to vest in the federal courts under the diversity of citizenship clause and will to that extent carry the burden of the federal jurisdiction. This is true; but the trouble is that Congress is without power to regulate procedure in the state courts.

Almost as important as either of the foregoing considerations is the fact that the abolition of the diversity of citizenship jurisdiction will destroy the uniformity of decision throughout the United States in matters of general law which, beginning with Swift v. Tyson, 16 Peters 1, has gradually been built up through the years. The doctrine is now well established that in matters of general law such as contracts, agency, negotiable instruments, insurance, negligence, torts, etc., the courts of the United States will follow their own decisions and not those of the several states. The result of this has been the creation of a great body of decisions of the federal courts upon the basis of which a lawyer can advise his client with assurance as to his rights. Destroy the jurisdiction based on diversity of citizenship and this uniformity of decision is destroyed. There is no movement in this country more important, I think, than that looking toward unification of the law. The American Law Institute and the Committee on Uniform State Laws of the American Bar Association and of the various local associations are all working to that end. For years the federal courts have been a powerful influence towards uniformity; but the destruction of their jurisdiction based on diversity of citizenship will mark the end of their usefulness in this field.

It seems to me, therefore, that upon these practical considerations—the guaranty of an impartial tribunal, the securing of a dependable procedure, and the preservation of a uniform body of law for application between citizens of different states in those branches of the law where uniformity is most important—the jurisdiction based on diversity of citizenship should be preserved; but there is an argument based on principle which appeals to my mind more powerfully than any of these. When a citizen of the United States must go into a court in the United States to assert or defend his rights, he ought to have the right to go into a court which is as much his court as it is the court of his adversary. The judicial settlement of disputes appertains to the sovereign; and when I go into court I wish it to be my sovereign that exercises sovereign power. The federal court represents all of the people of the United States; and if I go into a federal court in New York, it is as much my court as it is the court of a citizen of that state. The judge is appointed by my President, is confirmed by my senate and is subject to have his actions called in question by the senators and representatives whom I vote for as well as by the senators and representatives who represent my adversary. If I go into a state court in New York, however, I am in a court which represents a sovereignty upon which I have no claim. The judge represents the people of New York, he does not represent me or the people of the state from which I come. Citizenship in the United States is both local and national. For matters involving the local citizenship the local courts are provided. For matters which involve citizens of different states, only the federal courts can furnish to both a tribunal of the sovereignty to which both owe allegiance and to which both look for protection.

The arguments made in favor of destroying this jurisdiction are patently fallacious. It is said that to destroy it will relieve the pressure on the federal courts. One of the first duties of government, however, is to provide tribunals for administering justice to its citizens; and, if I am correct in thinking that a citizen is entitled to have his disputes adjudicated in a tribunal of the sovereignty to which he owes allegiance, it is unthinkable that that sovereignty should shirk its responsibility and abdicate its proper functions because of a comparatively insignificant matter of expense. Congestion should be relieved, if this is necessary, by creating additional courts, not by abandoning a historic jurisdiction of fundamental importance in order that the courts may have more time to devote to petty police court work.

It is said that trial in the federal courts is expensive and that the poor litigant should not be put to this expense. So far as court costs are concerned, they are not onerous and I think will be found little if any higher than the costs in the state courts of most of the states. The federal statutes provide, moreover, that the poor litigant in all federal courts, from the lowest to the highest, may prosecute or defend cases without prepayment of costs or the giving of security. Attending court in a city other than that of his residence may have worked some hardship upon a litigant in the early days of the Republic; but now that federal courts are held in almost every city or town of importance in the country and are readily accessible by reason of the good road and the automobile, there is no longer any hardship here worthy of consideration.

It is argued that the jurisdiction works unfairly in that it gives the non-resident a choice of jurisdictions. This, however, is not due to the jurisdictional provision, but to the removal statute. A resident may sue a non-resident in a federal court if he desires. It is only where he is sued in a state court in the state of his residence that he may not remove. There would seem to be nothing objectionable in this; for in such case he is sued in the court of a state of which he is a citizen and, if the non-resident has no objection to that jurisdiction, he should have none. If, however, this is thought to be a discrimination against him, the proper remedy is not to destroy an important jurisdiction of the federal court, but to amend the removal statute

so as to give him the right to remove if he desires. So far as giving a choice of tribunals to the non-resident defendant is concerned, the choice amounts to no more than the assertion of the right on his part to be tried in a court of the sovereign power to which he owes allegiance rather than in the court of the state of his adversary, which is to him a foreign state, in fact and in law.

Finally, it is said that this jurisdiction in the federal courts places property rights above human rights in that the non-resident is entitled to sue and be sued in the federal courts, but cannot remove to the federal courts criminal action instituted against him by the state. This seems to me an attempt to invoke one of the shibboleths of a certain school of thought, which can have no possible application to the question involved. The states, of course, have the right to prosecute and punish in their own courts violations of their criminal laws committed within their territorial jurisdictions. The maintenance of peace and order requires this; and the federal government is not concerned, except very indirectly, in its exercise. But why the exercise of this jurisdiction by the states should be an argument against the exercise of civil jurisdiction by the courts of the United States between citizens of different states with respect to their private rights, I confess I am not able to understand. Criminal actions, even against non-residents, are suits by the states in the exercise of their sovereign power. Suits under the diversity of citizenship clause are private controversies between citizens of the United States, who because they are not citizens of the same state are allowed to invoke the jurisdiction of the sovereignty to which they owe allegiance.

I see no valid reason for the destruction of this ancient jurisdiction of the federal courts. I see the strongest reasons against its destruction, in addition to those based upon constitutional theory and judicial efficiency already advanced. We in America are engaged in the building of a great nation. If we are to be successful we must cultivate a national outlook and we must see that there is the freest communication and intercourse, with unrestricted flow of capital and commerce into the various parts of the Union. Our country comprises a wide expanse of territory with a varied people with widely differing customs and ideals. We will develop commerce in the several states and will facilitate the flow of capital to sections where it is needed only if we maintain the confidence of investors that when they invest their moneys in distant states or in enterprises serving those states, their rights will be protected by the power of the government of which they are citizens and in which they have confidence. No man in the recent history of our country had a wider knowledge of our national problems or a profounder understanding of our national philosophy than Chief Justice Taft. As Circuit Judge, Secretary of War, President and finally Chief Justice, he knew the country as probably no other American of this generation. Speaking on this subject before the American Bar Association in 1922, he said:

"The theory is advanced that a citizen of one state now encounters no prejudice in the trial of cases in the state courts of another state, and that the constitutional ground for the diverse citizenship of federal courts has ceased to operate. If the time has come to cut down the subject matter of federal judicial jurisdiction, it simplifies much the question of the burden of work in the federal courts, but that has not been the tendency of late years. I venture to think that there may be a strong dissent from the view that danger of local prejudice in state courts against non-residents is at an end. Litigants from the eastern part of the country who are expected to invest their capital in the West or South will hardly concede the proposition that their interests as creditors will be as sure of impartial judicial consideration in a Western or Southern state court as in a federal court. The material question is not so much whether the justice administered is actually impartial and fair, as it is whether it is thought to be so by those who are considering the wisdom of investing their capital in states where that capital is needed for the promotion of enterprises and industrial and commercial progress. No single element—and I want to emphasize this because I don't think it is always thought of—no single element in our governmental system has done so much to secure capital for the legitimate development of enterprises throughout the West and South as the existence of federal courts there, with a jurisdiction to hear diverse citizenship cases."

I think that those who advocate this destructive proposal have not thought deeply about the matter. Do you realize that if the jurisdiction based on diversity of citizenship is withdrawn, holders of county and municipal bonds must go into the courts of the very localities which issued them to sue? Ever and anon we hear rumblings of threatened repudiation; and what a mockery it would be to require a non-resident bondholder to bring his suit in a county which had engaged in repudiation and try it before a jury which were judges of the law as well as of the facts. And with the jurisdiction based on diversity of citizenship would fall the power of the federal courts to appoint receivers for insolvent interstate railroads; and the great properties whose administration is so important to the welfare of the country at large would have to be managed by state receivers appointed in a number of independent local jurisdictions. I feel that I need not pursue the subject further.

I have addressed myself only to the fundamental proposals attacking the federal jurisdiction. The others are subject to the same objections. The proposal to raise the jurisdictional amount to $7,500 or $10,000 would destroy the jurisdiction in a large and important class of cases and would deny the right to resort to the federal tribunals to a large class of litigants who it was intended by the Constitution should have that right. The practical effect of the bill providing that a corporation shall be deemed a citizen of every state in which it does business would be to deny the right to invoke the federal jurisdiction to interstate railroads, insurance companies and investment corporations. It certainly seems to me that this time of financial distress is not a propitious one for the passage of laws which will frighten capital out of states which stand so badly in need of it. The last proposal mentioned is the outgrowth of the decision in the Black and White Taxicab case 276 U. S. 518, where a local corporation was dissolved and a charter obtained from an adjoining state so that a local group might invoke the federal jurisdiction in a case local in character. But the trouble with the proposal is that it goes entirely too far. I can see that what are essentially local corporations representing local citizens ought not be allowed to invoke the federal jurisdiction because they have obtained a charter from another state. But the remedy for this is some such provision as that a corporation shall be deemed a citizen of the state where it has its prin-

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CONVICTING THE INNOCENT

Two Cases in Which Criminal Justice erred Notably but, through Rare Good Fortune, Not Irremediably—Will Purvis, Who Was Inadequately Hanged and Lived to See His Innocence Established and Compensation Made by the Mississippi Legislature—Ameer Ben Ali, Convicted of Murder through Excessive Police Zeal in New York, Calls on Allah for Aid, Which Eventually, Though Tardily, Arrives

[*The accounts of the two cases printed in this issue are taken, with the permission of the author and the publishers, from the recent book "Convicting the Innocent: Errors of Criminal Justice," written by Prof. Edwin M. Borchard of the Law School of Yale University and published by the Yale University Press. They are but samples from the sixty-five cases that appear in this very interesting book.*—EDITOR.]

IN the latter part of the last century, following the disruption of the Ku Klux Klan, a strong, closely knit organization called the Whitecaps was formed in the Far South to put down criminality and petty thievery among the negroes. Its members, consisting of mature men, hardened lumber jacks, and young blades eager for excitement, swore in blood never to reveal its secrets. The negroes were terrorized by the Whitecap bands riding through the woods completely shrouded in white, often smeared with blood red. Except in unusual cases violence was little used.

Early in 1893, the band in Marion County, Mississippi, directed its action against a negro servant of one of its own members, Will Buckley. They unmercifully flogged him while Buckley, who knew nothing of their intentions, was absent. Buckley, enraged at this uncalled-for violence and the secrecy with which it was carried out, decided to submit the whole affair and to expose the secrets of the Whitecaps to the next meeting of the Grand Jury to convene at Columbia, the county seat. Rumors of Buckley's intention soon reached the Whitecaps. When the jury met, members of this organization were there to watch the moves of everyone suspected of having designs against the order. As a result of Buckley's evidence, an indictment was voted against three Whitecaps who were known to have been most brutal in the attack.

On his way home, accompanied by his brother Jim, and by the flogged negro, all on horseback, Will Buckley traveled a forest road which was hardly more than a lane beaten through the heavy underbrush by woodsmen. As the three horsemen, Buckley in the lead, came through a ravine, in which the underbrush was unusually dense, to a small stream over which they had to pass, a shot pierced the stillness. Buckley with a moan swayed in his saddle, then fell to the ground, dead. The assassin, who had been concealed in a blind, jumped out into the road, reloaded his gun, and fired at the others, but they instantly spurred their horses and escaped unscathed.

The road on which Buckley was killed led by the home of the Purvis family. It was generally believed that young Purvis, although but a mere lad of nineteen, was a member of the Whitecaps. *Two days after* the tragedy, bloodhounds were taken to the place of the murder and after much coaxing, picked up a cold scent which led them in the direction of the Purvis home. A neighbor of the Purvis family, who owned land on both sides of their small farm, and who had repeatedly attempted to gain their holdings, was one of the first to throw suspicion on the boy. Purvis was placed under arrest, taken to the county jail, and thrown into a dungeon used only for desperate criminals. He admitted that three months previous he had joined the Whitecaps, but repeatedly professed his innocence of the crime. The Grand Jury quickly returned an indictment against him for murder.

Excitement and indignation among the people ran high. Repeated disturbances had culminated in this foul murder. They were determined to take drastic action—to avenge the murder—and to do it without delay. Because mob violence was feared, Purvis was shifted from jail to jail.

District Attorney James Neville, well known for his vigorous prosecutions, had Purvis arraigned before Judge S. H. Terrill of the Marion County Circuit Court in August, 1893. The Purvis family were unable to employ counsel, so the court appointed David M. Watkins, a prominent attorney and a former senator of the state, to defend the prisoner.

Jim Buckley, the state's key witness, testified that he and the negro had witnessed the killing of his brother Will. When asked if he could name the man who killed his brother, he turned toward Purvis, and pointing his finger at him, said, "Will Purvis, there, killed the man." He related that he had been with his brother, Will, at the time he was murdered, that he had dismounted and had taken a pistol from the dying man's pocket and had leveled it at Purvis, who disappeared into the brush. The witness was positive in his identification. This, coupled with Purvis' admission that he belonged to the clan, made a strong case. Purvis in his own defense said that at the time the murder was reported to have been committed, he was talking with Lewis Newsom about the picnic which they had planned for the day. Newsom, a Confederate veteran, who enjoyed the high regard of his neighbors, and others substantiated Purvis' alibi, and further testified to his good character. The defendant's witnesses were all apparently discounted as being "interested," for the jury returned a verdict of "guilty as charged." The brilliant argument of defense counsel could not withstand the state's testimony. When asked by the court if he had

"any reason to give why the death sentence should not be pronounced against him," Purvis protested his innocence as he had done many times before. He was sentenced on August 5, 1893, to be hanged on February 7, 1894. In October, 1893, the Mississippi Supreme Court upheld the sentence.

At sundown the night before the execution, Purvis was taken to Columbia under heavy guard. The following day hundreds of curiosity seekers came to Columbia on horseback, in wagons, carts, and buggies; in those days executions were still public spectacles and gala events. When the hour came Purvis slowly mounted the scaffold, the minister close by his side. The crowd, breathless, and expecting a final confession, waited for Purvis' last words. Instead, he said simply, "You are taking the life of an innocent man, but there are people here who know who did commit the crime and if they will come forward and confess, I will go free." Then the rope was adjusted around the boy's neck and tested. The deputy sheriff, seeing an ungainly strip of rope dangling from the knot, cut the rope flush with the knot, while the minister droned his prayer: "God save this innocent boy." When everything was ready, the executioner, taking his hatchet, cut the stay rope holding the trap and the body of Purvis dropped with a sharp jerk. The knot, instead of tightening around its victim, untwisted, and Purvis fell to the ground, unhurt.

An indescribable horror shook the spellbound onlookers. Purvis staggered to his feet, the death mask falling from his head, and, turning to the sheriff, said simply, "Let's have it over with." With his hands and feet still bound, Purvis hopped up the first step of the scaffold before the awed silence was broken. A wave of emotion seized the crowd. Some ascribed to the incident a significance far beyond its natural import—that divine intervention had saved Purvis. The officials again prepared to carry out the execution. One of them, reaching for the rope, found that it was just beyond his reach. From the platform, he called down to Dr. Ford, "Toss that rope up here, will you, Doctor?" Ford picked up the rope and was about to toss it up, when he instinctively drew back. Ford had been bitterly opposed to the Whitecaps and had often so expressed himself in public, but all along he had refused to believe that Purvis was guilty of the crime charged. Letting the rope fall from his fingers, he said: "I won't do any such a d——n thing. This boy's been hung once too many times, already."

This speech seemed to crystallize the feeling of many. They cried, "Don't let him hang." Another group, hoarse with determination, shouted, "Hang him—he's guilty." The crowd was fairly evenly divided. During the confusion, Rev. J. Sibley sprang up the steps of the scaffold. Immediately all eyes centered upon him. Acting upon an inspiration he cried, "All who want to see this boy hanged a second time, hold up their hands." There was complete silence. Not a person moved. Then Sibley shouted, "All who are opposed to hanging Will Purvis a second time, hold up your hands." Almost all hands were raised. The crowd that had come to see the life wrenched out of a man in full health called for his release. The officers, charged with fulfilling their duty, were perplexed. It was their duty to proceed. Yet how could they go ahead with the execution of Purvis against the will of five thousand excited people? Dr. Ford advised the sheriff to ask for the advice of an attorney. One was called from the crowd. Attorney Foxworth could find no solution except to carry out the letter of the sentence, which stated that Purvis must be "hanged by the neck, until dead."

Again the preparations were made. Special care was taken that the rope would not slip again. When Dr. Ford heard the decision of the attorney, he replied: "I do not agree with you. If I were to call for the help of three hundred men to prevent the hanging, what would you do?" The sheriff realized that in such event he would be helpless. Ford added, "And I am ready to do it, too." Purvis sat by wretchedly, wishing that the whole thing would soon be over. The sheriff, realizing that it would be futile to try to proceed with the execution, loosened the bonds of the prisoner and reconducted him to the jail.

The question whether or not Purvis could be hanged was carried to the Supreme Court of the state. The court decided that the sentence would have to be executed—that officials had been careless in securing the knot was no reason that the law should be thwarted; and that, Purvis having been tried and found guilty, to free him would be to establish a dangerous precedent. To commute the sentence to life imprisonment was out of the question because of the deliberate nature of the crime and the direct testimony of an eyewitness. The court ordered that the sentence be carried out on July 31, 1895.

In the town to which Purvis had been removed, indignation over the ruling of the court ran high. On the eve of the day of execution, under cover of night, Purvis was taken from the jail by a group of friends and, with one companion, hidden on a secluded Mississippi farm, where his friends intended to keep him until they could be assured that at least his life would be spared.

Although the official search for Purvis slackened, his case still remained in the public eye, for in the following gubernatorial election, one of the issues was whether or not Purvis, if caught, should be hanged. The candidate in favor of modifying the sentence, A. J. McLaurin, won the election. When he assumed office, Purvis voluntarily surrendered himself, and McLaurin, in accordance with his promise to the people, commuted the sentence to life imprisonment on March 12, 1896.

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Two years later the state's star witness, Jim Buckley, who had identified Purvis as the murderer, stated that he might have made a mistake, and that possibly it was not Purvis whom he had seen. This knocked the bottom out of the state's case. Purvis was consequently given a full and unconditional pardon on December 19, 1898. Not long afterward he married a childhood companion, the daughter of a minister. Years passed. Purvis became a prosperous farmer, seven children played around his fireside; yet there was one cloud over his complete happiness—he had never been completely vindicated of the murder of Buckley.

In 1917, Joe Beard, an aged member of the community, attended a revival meeting of the Holy Rollers, who among other virtues emphasized the importance of the public confession of sins. At this

meeting Joe Beard came forward to join the church and dramatically declared that he had long been suffering under the weight of a terrible sin. He could say no more, but everyone instinctively felt that Beard must have had some connection with the Buckley murder. Shortly thereafter, he became seriously ill and called his minister and several friends to hear the rest of his confession: When in 1893 four Whitecaps met in a solitary part of a forest to discuss Will Buckley's intention of revealing to the Grand Jury the workings of the Whitecap organization, three of them decided that Buckley's death was the only effective means of protecting the other members. The other, a mere youth of nineteen, refused to have anything to do with such a horrible design, and, telling them that he was going to quit whitecapping, left the group and returned home. This was Will Purvis. Not long afterward, a meeting of the local Whitecap chapter decided to punish Will Buckley. Purvis refused to attend and thus incurred the enmity of the clan. In conclave two men, Louis Thornhill and Joe Beard, were chosen by lot to carry out the assassination. They built a brush blind, by which Buckley would pass on his return home, and lay in wait for him. Thornhill fired the shot which killed Buckley. Beard was supposed to have fired also, but because he lost his nerve, the negro and Jim Buckley were allowed to escape.

Beard's confession, which was corroborated by known facts, completely cleared Purvis of any implication in the assassination. The District Attorney was notified of the confession. Beard died before the meeting of the next Grand Jury. By this twist of fate the real murderer could never be convicted, inasmuch as the law of Mississippi provides that a deathbed confession, to have legal effect, must be made before witnesses and be signed. The confession of Beard was never signed. The murderer continued to live alone in a solitary cabin in the woods, but was never again seen in Columbia.

Purvis was thoroughly vindicated, but the fact remained that he had forfeited to the state four valuable years of his life, three of which had been devoted to hard manual labor. In 1920 the Legislature of Mississippi, at the instance of Senator Henry C. Yawn and Representative John A. Yeager, appropriated $5,000 to Purvis as compensation "for services done and performed . . . in the State penitentiary under the provision of an erroneous judgment." State Senator Scott Hathran, who had placed the black hood over young Purvis' face at the time of the attempted execution, counted it a privilege to make an eloquent speech in favor of this appropriation. Mr. Yeager wrote Purvis:

"After more than two years of energetic work, I have been able to obtain for you and your family the sum of five thousand dollars, which has a twofold meaning: first, that the State of Mississippi has confessed to a great wrong done you, and now removes all stain and dishonor from your name; second, that the State compensates you in the sum of five thousand dollars for the suffering you have endured. . . ."

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Community emotion called for Purvis' conviction and community emotion effected his reprieve. The providential intervention of the executioner, who unintentionally cut too much of the rope, saved Purvis' life and saved Mississippi from a gruesome blunder. The identification by Jim Buckley naturally impressed the jury and the community, for he was present at the scene of the crime, and was practically the only available witness. That his opportunity for observation was the worst possible and that he had an emotional urge to avenge his brother by confirming the guilt of the accused and that there was an original collateral motive which first pointed suspicion against Purvis—these facts were left out of account by all concerned. The strange situation caused by the slipping of the rope, the division of the populace, the cooling of the ardor for an execution, the marked rift between the processes of law (which required execution) and public opinion (which demanded reprieve or commutation), the political issue as to Purvis' fate, the armed jail delivery, his voluntary surrender after the election, the repudiation of his identification by Jim Buckley, the Governor's pardon, and then the indemnification by the Legislature, constitute about as much melodrama as one man's life can afford. It took nearly twenty-five years for Mississippi to right this wrong, but the state ultimately did what still could be done to show contrition. Purvis owes his escape from an undeserved death at the hands of the state to sheer good fortune, but his experience may help to bring about necessary reforms in the law.

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ON the southeast corner of Catherine Slip and Water Streets, on the Manhattan water front of the 1890's, there flourished the East River Hotel, a squalid drinking place and bawdy resort. At nine o'clock on Friday morning, April 24, 1891, the night clerk, Eddie Harrington, made his rounds of the hotel rooms, routing out all those who had not already left. Most of the rooms had been vacated. Room 31, however, was still locked. He rapped lightly—no reply; louder knocks—no reply. Eddie applied his master key to the door. Peering in, he was petrified by the ghastly sight of the mutilated body of "Old Shakespeare," a dissolute woman of sixty, a habitué of the neighborhood. She was a former actress, and received her nickname because she frequently quoted the Bard's plays when tipsy. Her name was Carrie Brown.

Eddie, greatly excited, rushed to the first floor to spread the news and call for the police, who soon arrived, accompanied by newspaper reporters. The coroner took charge of the body.

An examination of the body showed that the woman had been strangled, atrociously slashed by a filed-down cooking knife, which was found on the floor by the bed—and upon her thigh was cut the sign of the cross. As a murder this was a challenge to Chief Police Inspector Thomas Byrnes, who was justly proud of his record for solving crime mysteries. The cross on the victim's thigh

gave the case a special significance. It was the mark of "Jack the Ripper," the notorious London murderer who had baffled Scotland Yard by his nine brutal killings of women in the streets of London from December, 1887, to January, 1891. The New York Police Department had chided the London police about the "Ripper" and boastfully let it be known that if the latter appeared in New York with his evil doings, he would be in the "jug" within thirty-six hours.

On April 25, 1891, the day after the murder, the New York newspapers headlined the arrival of "Jack the Ripper." Inspector Byrnes and his force concentrated upon solving the crime. Investigation showed that "Old Shakespeare" had arrived at the hotel at about eleven o'clock with a male companion half her age, who gave a name which was written down by the clerk as "C. Knick." They were assigned to Room 31, to which they repaired with a tin pail of beer. Several of the hotel hangabouts saw the man and were able to supply descriptions of him—a medium-sized, stocky, blond, seafaring man. This man vanished and was never apprehended. The police combed the water front for him in vain.

Some of "Old Shakespeare's" acquaintances were found, among them Mary Ann Lopez, who had a frequent visitor known in the neighborhood as "Frenchy." Although a decided brunet, Frenchy's general appearance was otherwise not greatly different from the description given of the man who spent the night in Room 31; so Frenchy was arrested, among numerous others, for questioning. He professed not to be able to speak English. Many languages were tried on him until it appeared that he spoke Algerian Arabic—he was an Algerian Frenchman, named Ameer Ben Ali.

On April 25, Frenchy was a suspect. On April 26, the newspapers carried a police statement that he was probably implicated as being a cousin of the murderer. On Wednesday, April 29, the case was still unsettled, with the police apparently at sea. Detective Kilcauley of Jersey City reported to the police that a conductor employed on the New Jersey Central was very sure he had carried the murderer to Easton on his train. All the while, Frenchy was kept in the star cell at the police station.

On April 30, Inspector Byrnes gave several reporters the news that the case against Frenchy was complete, and that the police were convinced that he was the murderer. It was admitted that Frenchy was not "Old Shakespeare's" companion during the fatal night, but it was said that Frenchy had spent the night in Room 33, across the hall from the murder chamber, and that after the other man had left, Frenchy had crept across the hall, robbed his victim and killed her, and then crept back into his own room. As sketched by the Inspector, the evidence against Frenchy consisted of blood drops on the floor of Room 31 (the murder chamber), and in the hall between Rooms 31 and 33 (Frenchy's room); blood marks on both sides of the door of 33, as if the door had been pushed open by bloody fingers and then closed; blood marks on the floor of Room 33, on a chair in that room, on the bed blanket, and on the bedtick (There were no sheets). Blood was said to have been found on Frenchy's socks, and scrapings from his finger nails indicated the presence of blood. His explanations as to how the blood got on him were investigated and found to be false. Some of Carrie Brown's professional sisters said that Frenchy consorted much with "Old Shakespeare" and occupied Room 31 with her only the previous week.

On this same day (April 30), Frenchy, who by this time was called Frenchy No. 1, to distinguish him from other "Frenchies" involved in the case, was arraigned before Judge Martine and was formally committed to jail for the murder. Since the prisoner was unable to employ counsel, Judge Martine appointed Levy, House and Friend as his counsel. On May 1, Frenchy was removed to the Tombs.

At about this time it was learned that the prisoner had served a vagrancy term in March and April in the Queens County Jail and that two of his fellow prisoners there, David Galloway and Edward Smith, had reported that Frenchy had a knife like the one used in the murder.

On Wednesday, June 24, 1891, Frenchy's trial opened before Recorder Smyth. An interpreter from his own Algerian village had been found in New York. The state was represented by Assistant District Attorneys Wellman and Simms, and the police force by Inspector Byrnes and four officers. In addition to evidence bearing upon the facts as related by the Inspector to reporters on April 30, the prosecutors called many witnesses from the lowest stratum of New York life, to prove that Frenchy had been living a sordid life, and, particularly, that he was accustomed to staying at the East River Hotel and to wandering from room to room at night. On cross-examination, the credibility of these witnesses was thoroughly attacked.

The climax of the trial came on Wednesday, July 1, when District Attorney Nicoll himself took charge of the trial and called Dr. Formand of Philadelphia as an expert witness. Dr. Formand testified that he had made tests of samples of the blood found on the fatal bed in Room 31, in the hallway, on the door to Room 33, inside Room 33, and on Frenchy's socks, and found that they all contained intestinal contents of food elements, all in the same degree of digestion—all exactly identical. This led to the direct inference that all of these bloodstains resulted from blood flowing from the abdominal wound of the deceased. The Doctor stated that he would be willing to risk his life upon the accuracy of his tests. Dr. Austin Flint and Dr. Cyrus Edson corroborated Dr. Formand's testimony, and concluded the case of the state against Frenchy.

On July 2, the defense opened. After calling Constable James R. Hiland of Newtown to prove that when Frenchy was arrested in Queens County, he had no knife, the defense counsel put the defendant on the stand. He was asked about his life history, his eight years of service in the French army, and his movements in this country. Finally he was asked, "Did you kill Carrie Brown?" These words had hardly been translated into Arabic when Frenchy jumped to his feet, lifted his hands over his head, looked skyward, and fairly screamed in Arabic—he appeared to be having hysterics. No one could quiet him. Finally he sank back into his chair exhausted, and the translator gave the gist of Frenchy's plea: "I am innocent. I am innocent, Allah il Allah [God is God], I am innocent. Allah

Akbar [God is great]. I am innocent. O Allah, help me. Allah save me. I implore Allah to help me."

Frenchy made a bad witness, at times appearing to understand English and again pretending not to understand questions even when interpreted into his own tongue. He consistently denied killing "Old Shakespeare," but he became badly tangled up time and again upon cross-examination.

The defense called several medical experts to testify that the substances found in the various blood exhibits did not necessarily all come from the intestine, but that they might have come from other parts of the body. Each of these experts, however, was forced to admit that Dr. Formand was at the top of his profession and that they had high regard for his opinion.

The prosecution added an interesting bit of evidence by showing that Frenchy's tallow candle had been burned for more than an hour in Room 33 on the night of the murder, implying that he had been sitting up for some definite purpose. Testimony was submitted to show that he left the hotel at five o'clock the following morning, and that he "slinked" out of the door in a guilty manner.

The jury soon returned a verdict of guilty of second-degree murder. The Inspector and the prosecutors were much disappointed; but it was apparent that a compromise had been made by the jury. On July 10, 1891, Ameer Ben Ali was sentenced to Sing Sing for life.

The newspapers and the public had taken great interest in the case. The newspapers reported fully the testimony of each witness and the case was avidly followed by thousands. There was little disapproval of the verdict.

Newspaper men, among them Jacob A. Riis and Charles Edward Russell, who had been assigned to the case from the very beginning, were far from satisfied that this presented a true solution to the murder, and felt that it could never be unraveled until the police had found the man who had gone to Room 31 with "Old Shakespeare." However, the public authorities rested when Frenchy went to Sing Sing to spend the remainder of his days—soon to be transferred to the hospital for the criminal insane at Matteawan.

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Persistent rumors drifted back to New York among seafaring men that the murderer had quietly gone to sea, bound for the Far East. These tales could never be substantiated.

At the turn of the century, however, brighter days came to the penniless Frenchy. An application for a pardon on his behalf, based upon new evidence, was submitted to Governor Odell. It was established that just prior to the murder a man answering the description of the murdered woman's companion had been working for several weeks at Cranford, New Jersey, that this man was absent from Cranford on the night of the murder, and that several days thereafter he disappeared entirely. In his abandoned room was found a brass key bearing a tag 31 (the key exactly matched the set of keys at the East River Hotel) and a bloody shirt. From evidence previously adduced, it was quite certain that the murderer had locked the room when he left it. There never was any evidence to connect Frenchy with the key. The principal evidence against Frenchy had been the reported bloody trail between the two rooms, which, even as testified to at the trial, consisted of very small and faint blood marks. There were submitted to Governor Odell numerous affidavits of disinterested persons, described by the Governor as "persons of credit, some of whom had had experience in the investigation of crime," to the effect that these persons had visited the hotel room on the morning following the murder, and prior to the arrival of the coroner, and that after careful examination they had found no blood on the door of either room or in the hallway. It was to be inferred that the bloodstains, found by the police on the second day following the murder, had been made at the time of the visit of the coroner and the crowd of reporters when the body was examined and removed. It was further pointed out that even according to the police testimony there was no blood on or near the lock or knob of the door to the murder chamber which the murderer presumably unlocked, opened, closed, and relocked. This new evidence in the Governor's opinion demolished the case against Frenchy.

The application for executive clemency was based solely upon the ground that Frenchy was innocent. The Governor concluded his report on the case, after reviewing the facts, as follows: "To refuse relief under such circumstances would be plainly a denial of justice, and after a very careful consideration of all the facts I have reached the conclusion that it is clearly my duty to order the prisoner's release."

Frenchy's sentence was commuted on April 16, 1902, and it is understood that the French Government arranged for his transportation back to his native Algerian village.

Frenchy's conviction was apparently due to the zealousness of the New York police in seeking to sustain their boast that the murders which had baffled the London police would not be left unsolved in New York. In Frenchy they found a helpless scapegoat, and there is some ground to believe that the case was worked up against him by insufficient attention to the obvious operative facts. Why no better effort was made to trace the woman's companion or to account for the missing key to Room 31 is not easy to understand. That key was also the key to the mystery. As to the blood spots in the hall and on the door of Room 33, the conclusion seems inescapable that they were not there when Clerk Harrington discovered the murder. How they got there, we shall not venture to say. Let it be assumed that careless visitors dragged the blood around. Nor is it clear how the blood got on Frenchy; there is something very strange about that, which the testimony leaves vague and uncertain. Some of the reporters thought that there was no blood originally on Frenchy, or, if there was any, that it had nothing whatever to do with the murder. The evidence of the experts also seems to have been untrustworthy. In spite of the neatly woven case against Frenchy, the jury evidently had grave doubts, for in such a case a verdict of second-degree murder is not natural. It was manifestly a compromise between a belief in guilt and innocence. Frenchy was also penniless and the assigned counsel could not command the funds to run down the man who had occupied Room 31. The fact that entirely disinterested persons unraveled the mystery attests the weakness of the prosecution's case and justifies the inference that Allah had apparently not altogether deserted Frenchy.

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CHIEF JUSTICE HUGHES ADDRESSES JUDICIAL CONFERENCE OF FOURTH CIRCUIT

First Experience in "Riding Circuit"—Travels and Travails of Earlier Supreme Court Judges—The Judicial Power and Its Supreme Exercise in Maintaining Constitutional Balance and Enforcing Principles of Constitutional Liberty—The Best Way to Deal with Criticism of the Courts—Improvement in Administration of Justice and Responsibility of Local Bench and Bar — Changes in Rules Ordered by Supreme Court, Effective Sept. 1, etc.*

THIS is my first experience in "riding circuit." I am here to enjoy the privilege of judicial fraternity without assuming judicial burdens. It is a sort of "joy ride." At the outset it was expected that through their circuit work the Justices of the Supreme Court would be in close contact with the people. The Justices left their impression upon the communities they visited, and these communities had their effect upon the Justices. But the great labor involved in circuit duty soon brought suggestions of a change. Attorney General Randolph, in 1790, after commenting upon the endowments which it would be desirable to find in judges, and their slender opportunities "to explore the extensive range of science," pressed the question:—"What leisure remains from their itinerant dispensation of justice? Sum up all the fragments of their time, hold their fatigue at naught, and let them bid adieu to all domestic concerns, still the average term of a life, already advanced, will be too short for any important proficiency." Justice Iredell, speaking of his laborious journeys through North Carolina, South Carolina and Georgia, described himself as a "traveling post boy." Delays and many inconveniences resulted from the practice but the continued protests of the judges went unheeded.

Not only did Justices of the Supreme Court on circuit duty suffer the extreme hardships of travel in the early days, but they were exposed to the even greater peril of subsequent reversal at the hands of their brethren. If you find dissenting opinions hard to bear, no doubt you think that reversal is far worse. But there are comforting precedents. In *Bank* v. *Dandridge*, 12 Wheat. 64, all the Justices, except the Chief Justice himself, concurred in reversing Marshall's judgment at circuit in Virginia. Needless to say that Chief Justice Marshall dissented from this judgment of his court. He said that he should, as was his custom when he had the misfortune of differing from the court, "acquiesce silently in its opinion," did he not believe that the judgment at circuit "gave general surprise to the profession and was generally condemned." He then made the interesting observation "that the commission of even gross error, after deliberate exercise of the judgment," was "more excusable than the rash and hasty decision of an important question." And he set forth at length "the reasons and the imposing authorities" which had guided him in rendering the judgment that the court had reversed. You may recall that Webster, the successful counsel in that case, wrote after the argument: "As to *Dandridge*, we hear nothing from the Court yet. The Chief Justice, I fear, will *die hard*. Yet I hope that, as to this question, he is *moribundus*. In everything else, I cheerfully give him the Spanish benediction 'may he live a thousand years.'" Webster said that he felt a good deal of concern, for one reason among others, that he had spoken "somewhat more freely than usually befits the mouth of an humble attorney at law" of "the 'manifest errors' in the opinion of the Great Chief."

At a later day, Chief Justice Taney found great difficulty at circuit in construing the opinions of his own court. In *Williams* v. *Gibbes*, 17 How. 239 and *Gooding* v. *Gibbes, id.*, 274, Chief Justice Taney's judgments dismissing the complainants' bills at circuit were reversed by the Supreme Court, and the Chief Justice, following the illustrious example of Chief Justice Marshall, expressed his dissent from this result. He said that he had dismissed the bills of complaint "under the impression" that he "was bound to do so upon the principles upon which this court (Supreme Court) had decided them" in certain suits theretofore brought. But he added "It appears, however, by the opinions, just delivered, that I was mistaken and placed an erroneous construction on the opinions formerly delivered. . . . And I think it will be found that the language of the former decisions was fairly susceptible of the construction I put upon it, although that construction has turned out to be erroneous. I do not mean to say that the construction which the majority of the Court puts upon its former decisions now, is not the true one; but that the language used in it might lead even a careful inquirer to a contrary conclusion." The careful inquirer in that case was the Chief Justice himself. I commend to you these outstanding examples of judicial sufferings and of becoming fortitude. And these reflections suggest the especial pleasure with which I come to this circuit in the present comparatively unfettered and altogether agreeable relation.

In these difficult days, political philosophers are fertile. There is no lack of schemes for the regeneration of society,—schemes not infrequently of a sort which would not be needed by a society capable of freely adopting them. The construction of a theoretical paradise is the easiest of human efforts. The familiar method is to establish the perfect, or almost perfect, State, and then to fashion human beings to fit it. This is a far lighter under-

*Address delivered before the Judicial Conference of Federal Judges of the Fourth Circuit at Asheville, N. C., on Thursday, June 9.

taking than the necessary and unspectacular task, taking human nature as it is and is likely to remain, of contriving improvements that are workable. We cannot afford the impatience which demands the impossible and shirks the duty lying at our door.

Our responsibilities lie in the sphere of judicial activity. This has its obvious limitations, but we should not chafe at them. It is a sound tradition that judges are not to invade the field of legislative policy. We are separated from the conflicts of interests, from the passionate strife of parties. Nor are we to intrude into the domain which belongs to administrative planning save as this must be brought into harmony with the law. The important point is that these limitations are not imposed in disparagement of our task, but rather express the tribute instinctively paid to its transcendent importance. Our service must know no competing interest.

Criticism of courts should never be confused with criticism of the judicial function. It is the imperfection of the discharge of that function that is the target. It is the adaptation, the operation, of the machinery, not its purpose, that is called in question. Criticism may be ignorant or captious, it may be informed and intelligent, but it generally reveals respect rather than disesteem for the ideal of the administration of justice. It is upon respect for that ideal that we have built our institutions. These institutions, essential to translate that ideal into action, must be separate, distinctive. Justice Story put it strongly when he said: "Where there is no judicial department to interpret, pronounce, and execute the law, to decide controversies and to enforce rights, the government must either perish by its own imbecility, or the other departments of government must usurp powers, for the purpose of commanding obedience, to the destruction of liberty. The will of those who govern will become, under such circumstances, absolute and despotic; and it is wholly immaterial whether power is vested in a single tyrant or in an assembly of tyrants."

There is no more impressive sentence in the Federal Constitution than this: "The judicial Power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." These courts, separate, distinctive tribunals, thus represent the capacity of the Nation for impartial justice under the reign of law. The Congress has found it necessary to multiply administrative agencies to assist the exercise of legislative powers by adapting legislation to a host of particular instances with which the Congress cannot deal directly, and of facilitating prompt and efficient administrative action. Of necessity these administrative bodies have been entrusted with quasi-judicial functions. But to the extent that these bodies satisfactorily discharge such functions, they apply judicial standards as illustrated and enforced by courts. If courts—separate, distinctive tribunals—free from the intrusions of partisan demands, and as remote as possible from the play of particular selfish interests, fail in their mission, it is idle to expect that legislative or administrative agencies will conserve the essential interests of justice. We thus magnify not ourselves, but our office. We need to escape from routine properly to evaluate that office; we dwell upon it to make more keen our sense of our responsibilities, to strengthen our resolve, to gird ourselves anew.

The supreme exercise of the judicial power of the United States is in maintaining the constitutional balance between State and Nation and in enforcing the principles of liberty which the Constitution safeguards against arbitrary power. This is an extraordinary demand upon judicial intelligence, but it is an integral part of our system, and the duty imposed upon our judges cannot be escaped. We cannot perform this duty in a narrow, technical spirit. Our dual system requires recognition of appropriate State power as well as Federal power. It demands freedom for state authority to meet local needs. It demands opportunities for experimentation and progress. We must ever keep before our minds the illuminating phrase of Marshall, "that it is a *constitution* we are expounding." That Constitution was made, as Justice Matthews observed, "for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues." We should be faithless to our supreme obligation if we interpreted the great generalities of the Constitution so as to forbid flexibility in making adaptations to meet new conditions, and to prevent the correction of new abuses incident to the complexity of our life, or as crystallizing our own notions of policy, our personal views of economics and our theories of moral or social improvement. We should be equally faithless to our duty if we failed to remember that it is an *American* constitution we are expounding. It is permeated with American ideals, infused with an American conception of liberty. We cannot take the great phrases of the Constitution and disregard their historical background and fundamental purposes. These purposes were so expressed as to permit a broad range for new methods and achievements, but they were expressed in limitations. These limitations were imposed so as to safeguard rights believed to be fundamental. As Madison said, the tribunals of justice would be "in a peculiar manner the guardians of those rights"; they were to be "an impenetrable bulwark" against encroachment upon them either by legislative or executive power. The extent of these fundamental rights is a subject of perennial debate. But that they exist is a postulate of our system that cannot be ignored. They are limitations, as I have said, in the interest of liberty, requiring a measure of freedom of opportunity which even legislatures must respect. We would be as faithless to our judicial obligation in failing to recognize these boundaries of power because of individual conceptions of the value of new social schemes resting upon coercion by a class, or upon unrestrained legislative will, as we would be in tightening conceptions to reenforce particular economic views. Even those who appear to be disposed to decry other limitations, are not slow in invoking the aid of the courts to enforce their constitutional rights if freedom of speech or of the press is endangered. But that is only one of the essential conditions of liberty which the Constitution safeguards and which it is our duty to maintain. It is a highly difficult, but I think not an impossible task, to escape the errors of the extreme constructions which either would nullify, or would extend beyond their funda-

mental purpose, the great guarantees of individual liberty.

A young student wrote me the other day to ask whether I regarded myself as 'liberal' or 'conservative.' I answered that these labels do not interest me. I know of no accepted criterion. Some think opinions are conservative which others would regard as essentially liberal, and some opinions classed as liberal might be regarded from another point of view as decidedly illiberal. Such characterizations are not infrequently used to foster prejudices and they serve as a very poor substitute for intelligent criticism. A judge who does his work in an objective spirit, as a judge should, will address himself conscientiously to each case, and will not trouble himself about labels.

Now, our business is to diminish friction in the machinery of the administration of justice, to improve that administration by preventing unnecessary delays, by dispensing with useless formalities, by cutting through a web of meaningless technicalities, by insuring speedy, expert, impartial, application of our laws, thus enabling our courts as completely as possible to achieve their aims. I am not one to join in an indiscriminate attack upon judicial administration. I have often said that I believe that, taking it by and large, the history and accomplishments of the judicial department do not suffer in comparison with the other departments of our government. We may pursue our needed self-discipline without admitting the justice of uninformed and unintelligent criticism which from time to time is visited upon our heads. The best way to deal with criticism of the courts is to attend to our work and do it as well as we know how. Fortunately, we are living at a time when we are aided by serious surveys by competent persons. The work of courts in State and Nation is the subject of careful and expert examination as never before. But meanwhile we should pursue our own self-examination. My observation has taught me that an able judge, a master of his work, can generally find a way to do it promptly and effectively. Jurors leaving a court over which a highly competent judge has presided go forth with respect for the court and a new confidence in judicial administration. The spectacle of a weak and incompetent judge in action, or in inaction, does more to undermine public confidence than abuse of the institution by hostile critics. Judges with their continuous experience know where the technical shoe pinches and where procedure can be improved.

We are apt to look too far away for the accomplishment of reforms. Improvement is generally a personal and a local matter. I look in the main to the local bench and bar to remedy local defects in the administration of justice. In our Federal system we are organized in ten circuits. The judges of these circuits have a considerable field in which improvements so far as needed can be obtained. Consultations, comparison of views, in judicial conferences such as this conference, cannot fail to be of great value. Frank examination of conditions in judicial districts may lead not only to changes which may be effected locally, but to careful consideration of such changes as demand uniformity of action, and in such instances well-matured recommendations will naturally come from circuit conferences to the Judicial Conference of Senior Circuit Judges which is held annually. I am keenly sensible of the interest taken by the Judges of this Circuit in this conference. I know that you are burdened with your regular work, that preparation and attendance upon this conference doubtless entails an additional and perhaps a heavy burden. But I think that we should all endeavor to rise above the demands of the moment to consider the exigencies of the period, to put aside for a while the order of the day in order to observe how the department to which we belong is working and what we can do to make it work to better advantage. We must do our duty as judges of particular cases, but we are more than that,—we are guardians of an institution.

Let me say a word with respect to the changes in Rules which the Supreme Court has just ordered and which are to become effective on September 1st of this year. You probably remember that some time ago a Committee of the American Bar Association proposed a change in Equity Rule No. 75 relating to the preparation of the record on appeal. This Rule had been adopted after very careful consideration, but difficulties had arisen in its practical operation. I brought the proposed change directly to the attention of the Circuit Judges throughout the country and I received a number of well-considered comments. The Committee stated that in the accomplishment of the purposes they had in view, two separate proposals, not necessarily dependent upon each other, were made. These were, first, that the complete evidence adduced in the District Court be certified in typewritten form to the appellate court for purposes of reference or correction, and then that the appellant should file an abstract of the evidence upon points to be presented to the appellate court in narrative form, with the right of the appellee to file a supplemental abstract covering matters omitted from or inadequately covered by the appellant's abstract. The second proposal was that the requirement for presenting technical and expert testimony in narrative form should be abolished. It was represented that peculiar difficulties constantly arise in attempting to recast this testimony into narrative form and that the disadvantages of the practice far outweigh any advantages attainable. In response to the second proposal, the Supreme Court has ordered an amendment of Equity Rule No. 75, paragraph (b), by excepting expert testimony from the requirement as to presentation in narrative form. The Court did not feel at liberty to adopt the first proposal, abovementioned, in view of the requirements of section 1 of the Act of February 13, 1911, chapter 47 (U. S. Code, Tit. 28, sec. 865), and especially of the last clause of that provision.

At the conference held in this Circuit last year, Judge Cochran gave an address on some problems of procedure, in the course of which, after an instructive review, he suggested the advisability of a uniform rule as to the effect to be given to reports of masters appointed in equity cases, of commissioners or assessors in admiralty, and of referees in bankruptcy. I am happy to say that the Supreme Court has considered and approved these suggestions, and has promulgated rules as proposed.

The Supreme Court has also adopted amendments of its Rules to simplify and expedite its own procedure. It was formerly the practice for counsel

personally to present petitions for certiorari at the bar of the Court. As these applications multiplied, it became the practice to have them presented by the Clerk in open Court. But even this practice caused a waste of time, and recently the Clerk has been accustomed to read rapidly a long series of numbers without even giving the title of the cases. Of course, this is an unnecessary formality and hardly comports with dignified procedure. There is no reason why petitions for certiorari should be presented in Court. Accordingly, we have amended the applicable rule so that, as soon as the papers are complete, they are distributed to the Court for its consideration.

Some years ago an important reform was instituted which required the filing, in case of appeal, of jurisdictional statements showing the grounds upon which the jurisdiction of the Supreme Court is invoked. On the presentation of the jurisdictional statement, appeals which were obviously frivolous have been dismissed, and in other cases jurisdiction has been noted or the question postponed to the hearing on the merits. This procedure has been of value in preventing delays in the consideration of appeals, but it has become evident that the practice could be improved. The Court has accordingly adopted a rule by which immediately upon the presentation of the petition for the allowance of an appeal to the Supreme Court, from any court, there must be presented to the judge or justice who is asked to allow the appeal, a separate jurisdictional statement. This statement must refer distinctly to the statutory provision believed to sustain the jurisdiction, to the statute of the State, or statute or treaty of the United States, the validity of which is involved, and the statement must show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional provision relied upon. If the appeal is allowed, the appellant must serve a copy of the petition and order, and of the required jurisdictional statement, upon the appellee, and the latter may file an opposing statement and may include therein, or file therewith, a motion to dismiss or affirm. As soon as the papers are complete, they are to be distributed to the Court for its consideration without waiting for submission in open Court. There will be a very large gain in time through this improved method; frivolous appeals will be more promptly dismissed and the hearing of those worthy of attention will be expedited.

No changes in procedure can alter the essential requisites of justice, a fair opportunity to be heard and adequate consideration. But we can prevent waste. This waste is not all due to judges. In the lower courts, and in spectacular cases especially, counsel are at times prolix and, while occasionally the public may be entertained, promptness and efficiency are not served by their divagations. Remember the frequently quoted admonition recorded by the Latin epigrammatist, Martial, when the dissatisfied suitor exclaimed: "My suit has nothing to do with the assault, or battery, or poisoning, but is about three goats, which, I complain, have been stolen by my neighbor. This the judge desires to have proved to him; but you, with swelling words and extravagant gestures, dilate on the Battle of Cannae, the Mithridatic war, and the perjuries of the insensate Carthaginians, the Syllae, the Marii and the Mucii. It is time, Postumus, to say something about my three goats."

In the Federal courts, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct. It is his privilege and duty to instruct the jury on the law, and to advise them on the facts. In criminal cases, it is his obligation to see that the prosecution does not abuse its authority, or the defense confuse the issues. The majesty of the law is impressive and the rights of all are safeguarded when a trial is competently conducted.

I bring to you my congratulations on the admirable record made by the Judges of this Circuit. It is a Circuit honored by our most cherished traditions. Its annals are replete with the achievements of counsel and of judges of the highest distinction. I can wish for you no greater privilege than to emulate the example of your predecessors and no more durable satisfaction than to feel that the cause of justice has prospered at your hands.

Deaths of Members Reported

Mr. William George Harvison, of Des Moines, Iowa, a member of the Association since 1906, died at his home in Des Moines on May 20th. Mr. Harvison had practiced law in his home city for fifty-five years.

Mr. Joshua F. Bullitt, of Philadelphia, Pa., passed away on April 20th of this year. He had been a member of the American Bar Association since 1903.

Judge John R. Stubblefield, of Eastland, Texas, a member of the American Bar Association, died in his home on April 17th.

Mr. Walter L. McCorkle, of New York City, died on March 31st. Mr. McCorkle became a member of the American Bar Association in 1913.

Judge Charles B. Letton, of Lincoln, Nebraska, died on May 1, 1932. Judge Letton had been a member of the Association for thirty years.

Mr. Halleck F. Rose, a member of the firm of Rose, Wells, Martin & Lane, of Omaha, Neb., died in the latter part of April. Mr. Rose joined the Association in 1926.

Arista Bedford Williams, senior member of the firm of Castle, Williams, Long & McCarthy, of Chicago, died at his home in Chicago, on May 11th. Mr. Williams had been engaged in the practice of law for forty-eight years. He joined the American Bar Association in 1916.

Mr. Verner Gabrielson, of Fort Dodge, Ia., died on April 16, 1932. He was forty-eight years of age, and had been a member of the Association for ten years.

Mr. George L. Loomis, of Fremont, Neb., died on March 22nd. Mr. Loomis had been a member of the Association for twenty years.

Judge Harry E. Parker, of Georgetown, Ohio, died in Georgetown on March 16th. Judge Parker became a member of the Association in 1921.

Mr. Ashley Cockrill, a member of the firm of Cockrill & Armistead, of Little Rock, Ark., died on April 4, 1932. Mr. Cockrill joined the American Bar Association thirty years ago. He served as a member of the General Council.

Mr. Cornelius J. Sullivan, of New York City, a member of the Association since 1918, died on April 8, 1932.

Mr. H. McClure Johnson, a member of the firm of Offield, Melhope, Scott & Poole, of Chicago, died on March 29th. Mr. Johnson was forty-eight years of age, and had been a member of the American Bar Association since 1926.

Clara L. Power, of Boston, Mass., a member of the Association since 1922, passed away May 14, 1932.

W. A. Meador, of Albuquerque, N. M., a member of the Association, passed away recently.

ENGLISH JUSTICE THROUGH ENGLISH EYES

Sandwich Men with Warning Signs Give Hint That English Justice Is Not Wholly Satisfactory—Report of Committee of London Chamber of Commerce to the Lord Chancellor in November, 1930, Calls Litigation an "Expensive Luxury Beyond the Reach of a Majority of the People"—Bar Council Submitted Report in 1931 to Same Official Suggesting Reduction in Expense

By Edward S. Greenbaum
Member of the New York Bar

"ARBITRATE! DON'T LITIGATE." Sandwich-men carrying these signs picketed the Royal Courts of Justice in London. They were messengers of the Law Reform Association "warning all to keep clear of the terrible rocks and quicksands of litigation."

This sight was very disturbing to the New York lawyer who had come to London to observe the administration of English justice. He had often heard of the wonders of English procedure and had come to watch it in operation. Judges and other leaders of the Bar had recommended that it be used as a model for our practice. American lawyers have repeatedly told how, in English trials, the technical rules of evidence are ignored; how proof has been simplified by the "summons for directions"; how these and other things have made a simple and efficient system. To tales of these virtues, we had listened with respect and admiration. We had naturally assumed that all these things were true. It was in this frame of mind that the writer visited London in the summer of 1931, hoping to acquire familiarity with some details of English procedure.

But why do they have a Law Reform Association in London? Why were these sandwich-men walking up and down in front of the Law Courts? They distributed sensational pamphlets. One contained quotations reading:

"The Barrister is a public nuisance."—the late Lord Salisbury.

"The law is a nasty beastly business."—Judge Selfe.

"My advice is never to go to law at all."—Judge Cluer.

There were quotations from Lloyd George referring to "ruinous litigation," and from H. G. Wells telling that "barristers give our public life a tone as hopelessly discordant with our very great and urgent social needs as one could well imagine."

Another leaflet began—

"Public Warning
Ruinous Law Costs
A Public Scandal."

It gave cases showing "how terribly people have been stung by lawyers." In the West London County Court, a case involving a claim of 7 pounds carried costs of nearly 100 pounds. In an action to obtain possession of a garage with a rental value of 10 pounds a year, the costs were 70 pounds. In the Russell divorce case, the costs for establishing the paternity of a child are said to have been 30,000 pounds. A claim for 27 pounds carried costs of 897 pounds. These are but a few of many cases instanced.

Another "public warning" quoted Judge Sir Alfred Tobin as saying, "No wonder the Bar stinks sometimes in the nostrils of the public. It is perfectly shocking." Judge Sir Edward Parry said, "The expense of litigation is so terrible that it delays and destroys justice." These were followed by "Cries of the Victims." A litigant from Yorkshire wrote, "Owing to these lawsuits I have lost all my money." Another one in London said, "My case has been going on for nearly two years, and my wife is exhausted in mind and body." There were many others.

These outbursts left the American lawyer dazed and trying to assure himself that this was really England, the place where we are to find a sure cure for all our legal troubles. Was this really representative of the general attitude towards the Courts, or only the hysteria of irresponsibles? A visit to the Law Reform Association in Chancery Lane disclosed offices that were not impressive, and the Association has but little influence. Its literature, however, indicates a general feeling of dissatisfaction abroad. Even the Court of Appeals recognizes this. The London Times of July 29, 1931, reported a case in which Lord Justice Scrutton expressed regret that

> "the English Law and practice of commercial men were getting wider apart, with the result that commercial business was leaving the Courts and being decided by commercial arbitrators with infrequent reference to the courts."

Still clinging to our traditional idea of English justice, and believing that these were exceptional cases, the writer asked a solicitor for suggestions how New York practice could be improved by the adoption of English procedure. In order to acquaint himself with present conditions in New York, the solicitor read the "Study of Civil Justice in New York," the initial publication in the study which the Institute of Law of Johns Hopkins University is making. Then he wrote:

> "The most striking feature of the report to my mind is the similarity between conditions existing in America and conditions existing over here, subject to the limitation that everything in this country is on a much smaller scale."

Numerous references to the matter in the press and by the courts, and frequent complaints from its members, led the London Chamber of Commerce to appoint a committee, which in November, 1930, submitted a report to the Lord Chancellor. It is entitled "Expenses of Litigation" and is an extremely

able and interesting document. In seeking the causes for the high cost of litigation, it has considered fundamentals and details of the English system. It ranges all the way from advocating the abolition of the separation of the two sides of the profession between Barristers and Solicitors, to recommending a change of the rule which requires that witnesses stand while testifying. The American system is free from these and some other complaints relating to matters peculiar to the English practice, but most of the complaints apply with even greater force to conditions in the United States.

The report confirms the belief that litigation is far too expensive. It finds that the system and not the practitioners are responsible, and that, under the present procedure, the cost of litigation cannot be materially reduced, even where all concerned act reasonably and where there is no attempt on either side to cause delay. It predicts that if procedure is unaltered, it will bring its own remedy, because the persons involved in a dispute will go to any length to avoid going into Court; and states that changes must be made to conform to changing conditions:

"The settlement of civil disputes in a satisfactory manner is a necessary part of the economic life of all civilized communities. The procedure for the settlement of disputes can no more remain static than any other branch of the life of the community but must be adapted or altered from time to time to meet changing conditions. The great changes in economic conditions which have taken place in this country in the last 20 years and especially since the war have produced a criticism and examination on all sides of our economic institutions which our legal system also naturally cannot escape."

The report further states that the feelings and customs of the average potential litigant must be taken into account; the psychology of the business community concerning the settlement of disputes and the reward of business effort should be considered. As regards the former, the litigant cares very little about procedure as long as there is confidence in the tribunal. As regards the latter, the business man is accustomed to a system of reward for labor, varying according to the amount involved in the transaction. It is pointed out that today English procedure disregards both these principles.

The Chamber's report admits that English justice may be the best in the world, but states that there is no such thing as cheap English justice, and that litigation has become "an expensive luxury beyond the means of a majority of the people." It says:

"It is as if a person who wished to buy a cheap car were told that he could only have a Rolls or Daimler. His answer would be that if it is a case of either a Rolls or Daimler or no car, then he must go without a car. He would at once admit that the Rolls or Daimler was the best of cars but would say that he could not afford it."

The Chamber considers many matters which make the cost of litigation excessive. These include "pleadings of considerable length," "numerous interlocutory proceedings," the necessity for calling expert witnesses, the "increasing length of trials," and particularly the requirement that "all documents and facts, however small, should be proved by the oral evidence of parties and witnesses personally present in Court."

It advocates (except in fraud, libel and domestic relations cases)

(1) That all documents should be accepted in evidence unless formally challenged and oral proof demanded, in which case the challenger should have to pay the costs of the oral proof unless the Court otherwise orders;

(2) That evidence be presented in the form of statements signed by witnesses. If any party demands that a witness be produced for cross-examination, the cost of the examination and the witness's expenses should be paid by the challenger unless the Court otherwise orders;

(3) That in all cases involving technical matters an expert should sit with the judge as adviser;

(4) That all proceedings before trial should be simplified and the point at issue shortly stated in the pleadings so that an opponent may not be taken by surprise;

(5) That dates for trials should always be fixed and adhered to and that the length of the trial should be shortened;

(6) That the management of the Calendar and business administration of the courts should be entrusted to a business manager.

This report aroused a great deal of interest. The Lord Chancellor asked the General Council of the Bar (composed of the Barristers) and the Law Society (composed of the Solicitors), to express their views on the points raised. The Bar Council submitted its report to the Chancellor in June, 1931. It reluctantly admitted that English justice had become unduly expensive and said "that a reduction in expense must be found by alterations in the system and procedure." It substantially agreed with the Chamber's first, second and fifth suggestions, but did not approve of the others. The Law Society's report did not differ materially from that of the Bar Council.

In commenting on these reports, The Solicitors' Journal said, "It is fervently to be hoped that some useful practical result will emerge from the plentiful suggestions that have been made with regard to the cheapening of legal procedure."

In other parts of England, also, this subject received serious study. The Council of the Manchester Law Society was in general agreement with the report of the Law Society. It stated that in certain cases appeals were a "glaring scandal," and felt "that but one appeal from a Judge should be allowed in any case, because the question of early finality in commercial disputes is directly relevant to the cost of litigation."

At the dinner given to His Majesty's Judges on July 10, 1931, Lord Sankey, the Lord Chancellor, said that he would study carefully all the suggestions, and those that could be handled administratively would be dealt with by the Rules Committee. He said that he could not hold out much hope of Parliament passing any controversial legislation, but would be glad to introduce any measure upon which there was agreement.

From all this, it is clear that the English system is not working perfectly. It has many defects. Even its harshest critics admit that, in many ways, it is the finest in the world. But they are not satisfied with that. They insist that it be further improved and be made workable for all needs and for all purses.

Progress in England has been made by improvements brought about by the public and not by the lawyers. It is realized that the administration of the law is a living thing that must be altered from time to time, to meet changing conditions. The pub-

lic in England knows this and considers it its problem, and not the exclusive task of the legal profession. For centuries, the French language was used in all legal documents, although it was understood by only a very few. In 1362 Parliament passed an act that thereafter only English should be used. But for nearly three hundred years more, the lawyers persisted in using French and gave it up only after Parliament imposed a fine of 20 pounds on all persons using any language other than English in legal proceedings. Up to 1851, it was the law that neither the plaintiff nor the defendant could be a witness. Every common law judge in England, except one, opposed any change in this rule. Yet it was changed, and no judge could be found today who would advocate the old law.

In spite of its shortcomings, the English system is superior to ours. Anyone familiar with the workings of the courts in New York would have to agree with Frederic R. Coudert's statement that, "In the English law courts, matters are now disposed of with an expedition and a substantial justice which puts us so-called progressive Americans to shame."

It is difficult to imagine the storm of protests that would arise in England against certain conditions now existing in our own courts. Complaint is made in England that trials are too lengthy. The recent trial of Lord Kylsant in London, arising out of the Royal Mail Steamship Company case, took just nine days. The trial of the defendants in the Bank of United States case in New York lasted twelve weeks. It took four days to impanel the jury, whereas, in the Kylsant case, the jury was impaneled and in the box when the trial began. In that case Lord Kylsant was charged in the spring of 1931, convicted on July 30th, had his appeal dismissed in November and went to jail on the same day. If the Long Vacation had not intervened, the case would probably have been finally disposed of in August. The defendants in the Bank of United States case were charged in the month of January, 1931, convicted on June 20, 1931, and their appeals have not been decided up to the present writing.

Judged by our standards, English trials are models of efficiency and simplicity. There is an atmosphere of quiet dignity and simplicity that inspires confidence. But complaint is made that the rules of evidence are applied too technically, and that trials are not conducted in accordance with the requirements of modern business. The London Chamber of Commerce says that "Undoubtedly the main cause of expense is the English law of evidence." The judges and lawyers are able and experienced. Objections to evidence are rarely heard. In New York, one distinguished Supreme Court Justice tells the Bar Association that these objections sound through our courts "like the drone of destroying locusts," and another states that most of the lawyers that appear in court are below standard in both fairness and skill. Yet nobody is surprised and nothing is done.

We have much to learn from England, not only as to their procedure, but also as to their method of securing the necessary improvements. Will Rogers, reporting the Disarmament Conference from London, wrote:

"Well, the conference didn't do anything today as usual, but there was a famous case being tried where a fellow had swindled through fake stock transactions the public out of ten million dollars. They just gave him fourteen years so fast that it took all the Americans' breath away and all they have talked about today is English justice compared to ours. It's the consensus of opinion of all of them here that if it had been at home he would have gone into vaudeville or the Senate. None of the habus corpusing and suspended sentences or appealing it when you commit a crime over here. You just wake up surrounded by a small space. *Our delegation ought to be over here studying British justice.* Our battleships are not harming us near as much as our court delays, corruption and shyster lawyers."

Our laymen are beginning to realize that the administration of the courts is their problem. At the same time that the London Chamber of Commerce was making its study, the Chamber of Commerce of the State of New York was working on the same subject and reached the same conclusions, in a carefully prepared report. The London Chamber made definite and concrete suggestions, which it transmitted to the Lord Chancellor. They have borne fruit. The first result was obtained last summer when the Court of King's Bench announced that upon the consent of the parties, it would try commercial cases upon affidavits and documents and without the necessity of calling witnesses. The Lord Chancellor then called upon the Rule Committee of the Supreme Court to assist him further in finding a solution to the problems submitted by the Chambers of Commerce.

As a result the Rule Committee on April 23, 1932, published New Rules of Procedure which make important and far-reaching changes. In a memorandum accompanying these Rules, the Committee referred specifically to the suggestions of the Chamber of Commerce and other bodies and stated that it was not surprising that present-day criticisms and demands have arisen, and that changes of procedure in the courts are necessitated from time to time by changes in the practice of business men.

The new rules are intended to provide direct and speedy methods for disposing of cases subject to such disposition. The first step is for the plaintiff's solicitor to determine whether the case is suitable to the new procedure and, if so, to write the words "Fit for the New Procedure" on the writ. At an early stage the Judge or a Master will then dispose of preliminary matters. He is given broad power and may set down the case for trial, transfer it to another court, and even, under certain circumstances, provide for proof by affidavit instead of oral testimony, or order the issue tried with or without a jury. He may limit the number of expert witnesses, or refer a question involving expert knowledge to a Special Referee for report. The parties may consent in advance that no appeal be taken or that the appeal be limited to a question of law only.

The court thus attempts to meet the desire which exists in the commercial world to approach the courts at less cost and with well-founded hope for an early decision. The judges state that they offer the rules "with some confidence to men of good-will." The importance of this accomplishment is obvious. It should furnish a stimulus to lay organizations in the United States, to follow up the work which they have commenced. They, too, should insist that appropriate action be taken by the courts to meet the needs of the persons for whom the courts exist. Such action would go a long way to remove the causes of dissatisfaction.

A TRANCE IN COURT

Spiritualist Medium, Appearing as Plaintiff in Libel Suit in London, Goes into Trance, to the Great Annoyance of Mr. Justice McCardie—Lady Conan Doyle and Sir Oliver Lodge testify for Plaintiff—Questions of Evidence Involved

By Blewett Lee
Member of the New York Bar

IN his essay on "Trial by jury of things supernatural," that delightful scholar James Bradley Thayer says, "it is not impossible that we may yet see something of this sort done about Spiritualism: that is to say, may see the question passed upon whether it is or is not true."[1] In the course of this essay we see Sir Matthew Hale sending women to their death as witches, and Sir Thomas Browne giving expert testimony at their trial. Mr. Thayer also tells us of a certain Mrs. Fletcher in England who not long before 1890 was convicted of obtaining money by false pretences, and who claimed at the trial that her communication with spirits had been real, and offered to prove it. This the Court refused to permit her to do. (Mrs. Fletcher took the unusual remedy of writing a book about it.) The Court indeed submitted to the jury the question of her own belief in the manifestations. But was not she entitled to prove the genuineness of the communications themselves, if she could?

Today in the light of great accumulations of evidence we might go so far as to say that "communications" sometimes appear to be really received. But from whom? Aye, there's the rub! How can we possibly give such "communications" their face value? Can we really give them value at all? Emerson treated Swedenborg's teaching as impossible, but Swedenborg himself was a great phenomenon, and we cannot say, like the rustic who first saw a hippopotamus, that "there was no such animal." In all seriousness, how did Swedenborg get that way? He was just crazy, said one of my medical friends, who would have said the same, I fear, of all spiritualists. There may be a better way to account for Swedenborg, the greatest of all mediums, and his mental world, even considered to be a world of illusion, the work of a great but sincere imagination. We can even conceive of ghosts living in similar mental worlds, each in his own, in which case they would not be poor ghosts, unless they had poor imaginations. They might imagine alike about many things by reading each others' minds.

Be all that as it may, Mr. Thayer's prophecy has already come pretty near being fulfilled. In the London Times, Weekly Edition, of April 14th and 21st, 1932, and more fully in the English daily papers (The Times, April 6, 7, 8, 9, 12, 13 and doubtless in the Daily Mail), appear accounts of the trial of the libel case of *Louisa Anne Meurig Morris v. Associated Newspapers, Limited*, on account of an article published in the Daily Mail on January 26, 1931, headed "Trance Medium found out," and containing a passage "Power's Sermon Jargon. One talk for all Texts." "Power" was one of the medium's "controls" who preached. The defense was fair comment on a matter of public interest and also justification. Evidence of high quality was offered on both side. In the course of her cross-examination, Mrs. Morris, with tears streaming from her eyes, apparently went off in a slight trance, and immediately afterwards exclaimed incoherently, "The Christ—A vision of Christ came." The Court then adjourned the hearing for ten minutes. Later a gramophone record of one of "Power's" sermons, and another record, part in "Power's" voice and part in Mrs. Morris' natural voice, which sounded quite different, were played. Lady Conan Doyle, widow of Sir Arthur, and herself a medium, testified for the plaintiff, as did also Sir Oliver Lodge, Mrs. Champion de Crespigny and other witnesses, described as eminent.

The following is a quotation from the Weekly Times of April 21, 1932 (page 486):

> "In the course of the Judge's summing-up, Mrs. Morris suddenly closed her eyes, rose from her seat, and, clasping the lapels of her costume, addressed the Judge in a deep voice, 'Hearken to my voice, Brother Judge,' she said.
>
> "'Really, we cannot go on. She must sit down. We cannot have all this,' said Mr. Justice McCardie.
>
> "For a moment the voice ceased, and then it broke out afresh.
>
> "Serjeant Sullivan said that there would be harm in touching Mrs. Morris.
>
> "'Take her out,' ordered the Judge.
>
> "The voice continued: 'Do not touch her until I have left the body.'
>
> "The Judge insisted upon the removal of Mrs. Morris, and she was carried out of the Court and taken to an anteroom by an usher and a friend.
>
> "Mr. Justice McCardie adjourned the Court for a few minutes.
>
> "Mrs. Morris was unconscious for some time, but eventually recovered sufficiently to leave the building in the company of some friends.
>
> "After an absence of three hours the jury found for the defendants on a plea of fair comment on a matter of public interest. They found, however, that no allegations of fraud or dishonesty against Mrs. Morris had been proved.
>
> "Judgment was given for the defendants, but the Judge said that Mrs. Morris was entitled to any costs to which she had been put with respect to the plea of justification as distinct from the general costs of the action."

The trial appears to have been a fair one and free from abuse or ridicule. The puzzled Judge might have taken to heart the following quotation from the testimony of Sir Oliver Lodge about a conversation of his own, stated to have been through a medium with his son Raymond who had been previously killed in France:

Sir Oliver: "You live in a world of illusion."

Raymond: "So do you, father."

Such a trial could hardly have occurred in the time of Vice-Chancellor Gifford, who denounced

1. Thayer's Legal Essays, 327, 328 (1908 Ed.)

Spiritualism in good round terms in the celebrated case of *Lyon v. Home*.[2] Mr. Serjeant Ballantine in his reminiscences[3] gives us a description of the libel suit by Naval Lieutenant Morison (publisher of Zadkiel's Almanac) against Admiral Belcher, who had charged Morison with fraudulently pretending to show spirits in a crystal ball. The trial was before Chief Justice Cockburn. The case was hard fought. Witnesses testified as to what they saw in the ball. The plaintiff got a verdict for twenty shillings. Lord Lytton, who was present but did not testify, complained of the levity of some of the witnesses.

Mrs. Morris' trance and the action of "Power" seem to be in the nature of real evidence, bearing upon the question of fraudulent intent. An interesting legal question arises if Mrs. Morris had at first offered to go into trance and to produce "Power" in court. There are some early decisions, not of high authority, that such evidence would not be admissible, because it would be impossible for such testimony to be genuine.[4] He is a wise Judge who knows the limits of the possible, as wise as he is just when he fails to give an accused person a full and fair chance to defend himself. I have read of a judge who refused to allow a defendant to undertake to do in court the things which he had been charged wtih fraudulently representing that he, the defendant, could do. The judge said it would make him ridiculous, but surely not as ridiculous as he made himself. There is a Scotch case of a fortune-teller being prosecuted in which the defendant was allowed to present evidence that she had the power she claimed by showing various successful prophecies, but she failed to convince the court.[5]

Lawyers who are curious about Spiritualism, that strange but firmly set facet of human nature, will find interesting the recent English book, "Talks with Spirit Friends, Bench and Bar, by a Retired Public Servant" (Brentano's). Older members of the American Bar Association will recall the wit of that prince of lawyers, Sir Frank Lockwood, sometime Solicitor General, and the high-mindedness of Lord Justice Kennedy, both of whom figure on the list of "Communicators" along with other jurists just as eminent. Sir Frank appears to be the chief of the group, and not to have deteriorated, nor indeed have the others, for that matter. But as to whether they are really still carrying on in manner and form as alleged in the book, I must leave to those who knew them better. Perhaps

> Your bright Promise, withered long and sped
> Is touched; stirs, rises, opens and grows sweet
> And blossoms and is you, when you are dead.

2. (1868) L. R. 6 Eq. 655, 682.

3. Some Experiences of a Barrister's Life (Am. Ed. 1882) 337-8.

4. Status of Psychic Facts in Courts of Law (1890) 24 Am. Law Rev. 1008 (Article by Francis J. Lippitt, severely criticizing such rulings.)

5. Laing v. McPherson, 1918 J. C. 70, 74.

THE REPORT ON CRIMINAL PROCEDURE*

Three Objectives within Reach of the Commission, with the Limited Time at Its Disposal, All of Which Were Attained in the "Report" — Attitude of That Body towards Preparation of Document—Conclusions and Recommendations—Constructive Suggestions for Improvement Which Merit Attention

BY JUSTIN MILLER
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REPORT No. 8 on Criminal Procedure, issued by the National Commission on Law Observance and Enforcement under date of June 9, 1931, is one of the smallest in bulk of any of the reports of the Commission, consisting as it does of only 51 pages, including the dissenting report of Monte M. Lemann. The value of the report is critically challenged by Mr. Lemann in the opening paragraph of his "dissent" and provides an interesting basis upon which to evaluate the information, conclusions and recommendations presented by the other ten members of the Commission. Mr. Lemann begins his statement as follows:

"The Commission has heretofore found that in the past discussion of the subject of Crime and the offender a relative over-emphasis has been given to procedural questions. Such questions have received wide and, upon the whole, adequate attention in professional and lay discussions. The more important of them are adverted to in the Report on Prosecution and Mr. Bettman's study appended thereto. In view of these facts, it has seemed to me that no useful purpose could be served by a report on criminal procedure, unless the Commission had some important new proposals to make, adequately supported by factual data and study. The report submitted by the Commission does not seem to me to contain such proposals."

If one were disposed to agree with the assumptions made, he could easily reach the conclusions stated in the paragraph quoted above. As a matter of fact, however, it is submitted that the Commission had much more to accomplish than could be accomplished only by new proposals supported by factual data and study. No doubt, many people expected that this Commission would be able, in

*Report No. 8, on Criminal Procedure, issued by the National Commission on Law Observance and Enforcement.

the relatively short time in which it was given to do its work and with the relatively small amount of money provided for that purpose, to make extensive studies, to obtain by scientific methods large quantities of factual data, and as a result thereof, propose important new proposals. That those persons were bound to be disappointed was easily predictable before the Commission began its work. We read, from day to day, in scientific journals, of the years of laboratory work and experimentation and of the millions of dollars which are devoted to research work in connection with the physical sciences, and no one would suppose that even a small problem in chemistry or physics could be worked out between sessions of Congress upon a specified appropriation. For some strange reason, it seems to be assumed that such work can be done upon a scientific basis in connection with the solving of the problem of crime, even though it be deeply rooted in every instinct and emotion of mankind and pervasive of every social interest and institution.

Although the task proposed by Mr. Lemann is one of tremendous importance and one which well merits being done, when a proper organization and sufficient funds shall have been found for that purpose, still there were several objectives within reach of the Wickersham Commission which were well worth achieving although they fell far short of that set by the dissenting member thereof. In the first place, the Commission could perform a useful service by bringing together and publishing under the authority of its name, the result of the work of many investigators in this field during past years, thus giving stability and authority to that work which had been well done and to those conclusions which had been properly drawn, and providing a basis upon which others might go forward in their investigations.

In the second place, the Commission could emphasize, through its report, certain proposals heretofore made and certain ideas heretofore expressed which are entirely valid but which have lacked vitality because of the fact that they have not been sponsored by persons of sufficient authority.

In the third place, by the publication of its report, the Commission could gain wide public consideration of such ideas and such proposals through newspaper publicity, through the discussion of politicians and statesmen, through magazine articles, even though such discussions and comments might be highly critical in character. These objectives the Commission has achieved, even in this little report on criminal procedure, although it is quite true that no few proposals are made and that such as are made are, generally speaking, inadequately supported by factual data and study.

Certainly when consideration is given to the importance of criminal procedure it would have been very unfortunate if no report had been made upon this subject by the Commission. Clearly it was called upon to make some kind of report, even though it be superficial and sketchy in character. No doubt the members of the Commission were impressed with this fact and no doubt this is largely responsible for this report. For even though it is true that in the discussion of the subject of crime a relative over-emphasis has undoubtedly been given to procedural questions, nevertheless, criminal procedure is a matter of tremendous importance and one which must have proper consideration, in a general survey such as this, even though other phases of the subject may not have been properly emphasized in the past. The need is for greater emphasis upon other phases of the subject rather than for less emphasis upon the subject of criminal procedure.

In spite of all this, however, it must still be admitted that this report is of much thinner substance than are most of the rest of those issued by the Commission. Much of it could have been dictated offhand by Dean Pound and perhaps by other members of the Commission. At the bottom of page 23 we find this statement: "Moreover, the jury in a homogeneous pioneer or rural community functioned under circumstances much more favorable for good results than those which obtain in the heterogeneous diversified urban industrial community of today." This language has been used so frequently in the writings of Dean Pound that it has become almost ritualistic in character and could not fail to be identified by anyone who is familiar with his writings. The attitude of the Commission towards the preparation of this report is clearly expressed on page 1, where it is said: "As the subject was one with which a majority of the members of the Commission had an intimate acquaintance from many points of view, from experience on the bench, or as public prosecutors, or in the trial of criminal causes, or in teaching criminal law and procedure, or in more than one of these capacities, it was not thought necessary to employ experts to make special investigations."

Considering the personnel of the Commission this was probably more true of criminal procedure than of any other subject which it considered. With such a background of experience the expressions of opinion contained in the report are perhaps as valuable as could be expressed by any other group in the United States, without the expenditure of tremendous sums of money and a great deal of time, in further investigation, in order to prove, by factual data, matters which are well known, or generally assumed to be true, by those who are engaged in the actual administration of the criminal law. Moreover, the Commission lists twelve sources of information which it used, in addition to this first-hand knowledge possessed by its members. There can be no doubt that richer material is generally available, relating to criminal procedure, than is available in connection with any other branch of the law involved in the administration of criminal justice. The commentaries which accompany the code of criminal procedure of the American Law Institute are in themselves a highly valuable and complete collection of information so far as the purely legalistic phases of the problem are concerned. The surveys of criminal justice and reports of crime commissions, which are referred to, also contain material of great value, the duplication of which, by the Commission, would have served no particularly useful purpose.

Ten pages of the report are devoted to a consideration of "Petty Offenses and Inferior Courts.' Much of the discussion of the subject relates to administration rather than procedure. On page seven

is an admirable summary of the administrative problem involved:

"The legal profession has very little interest in petty prosecutions which today are chiefly the concern of the lowest stratum of the profession. Also the public has assumed that a petty judge is good enough for petty cases. But what is of little profit to the lawyer may none the less be of much profit to the law. The importance of petty prosecutions for the sum total of criminal justice can not be measured by the amount of the fine or duration of imprisonment in the average of such cases. They must be looked at with reference to their place in the scheme of criminal justice as a whole and the part played by them and by the offenses to which they relate in the whole process of urban life."

After stressing the importance of these petty prosecutions, the report states, on page 13, the rather startling conclusion that "As to procedure in the inferior criminal courts of the States, there is relatively little to be done." It is interesting to consider this statement in connection with the first recommendation which appears at the bottom of page 46 in the conclusion of the report, as follows:

"There should be a wider use of administration rather than arrest and prosecution with respect to police regulations. Those who have studied American police systems agree that too great a burden is put upon the police by leaving it to them to arrest or to ignore in such cases, with no provision for administrative adjustment."

Of course this recommendation is in line with present practices in the police departments. It is at least an open question, however, whether the administrative powers of the police should be extended so far as to permit the final disposition of cases. It is a fair question to ask whether a substitution of such administrative methods should not take place in the inferior criminal courts rather than in the police departments. If so, then clearly there is much to be done concerning procedure in the inferior criminal courts. Our experience in substituting administrative methods for judicial methods in connection with the work of the juvenile courts and in connection with the administration of the device of probation, suggests the possibility of a valuable extension of administrative methods into the inferior criminal courts. We have little factual basis, indeed, for suggesting a wide extension of administrative power in the police departments.

In spite of our success in using probation in the superior trial courts, there seems to be a natural reluctance upon the part of lawyers to advise a further extension of administrative methods even in that court. The report of the Commission speaks of the fact that we have burdened our courts too heavily with the tasks incident to judicial decision and suggests the importance of the extension of administrative methods, but does not suggest that the judges might themselves become administrators; a method which, because of its greater speed and summary character, would quickly relieve that burden.

The evil incident to the trial of criminal cases de novo on appeal from the inferior courts is properly condemned. The testimony of lawyers familiar with criminal practice would reveal that the continuance of the practice of trial de novo is justified by law-makers and practitioners on the ground that personnel, procedure and administration, in these inferior courts, are so disgracefully inadequate. In order to secure relief from this evil as well as to extend preventive justice as distinguished from retributive justice the Commission's recommendation, for adequate judicial and administrative personnel in the inferior courts, becomes imperative.

Sixteen pages of the report are devoted to the title "Procedural Protection of the Accused." Brief consideration is given, in this section, to arrest; preliminary examinations; indictment and information; bail; jury trial; the presumption of innocence; exemption from questioning and from comment by counsel or court on failure to testify; review by the trial court; review by habeas corpus and review by appeal. Frequent references are made to the work of the American Law Institute. Three pages are devoted to "Criminal Pleading"; four pages to "Evidence in Criminal Cases"—of which two pages are given to "Expert Evidence." Obviously the discussion is entirely inadequate. Similar brief references are made to some of the problems arising in connection with the conduct of trials and the review of convictions. In the three pages devoted to "Review of Convictions", nearly two are concerned with motions for new trial and the recommendation is made that "the ultimate court of appeal should have plenary jurisdiction to *reverse the conviction and order a new trial whenever* it is satisfied that the defendant has not received a fair and impartial trial."[1] Oddly enough, this recommendation follows, by only a page, a highly laudatory reference to the English appellate procedure, which gives the court of criminal appeal "full jurisdiction over questions of both law and fact, and authority to pass upon both the legality and the propriety of the sentence imposed." One looks in vain for any consideration of the best interests of society, as a whole, in this particular part of the report. No mention is made of the inadequacy of our present, generally prevailing laws governing appeals on behalf of the people or the state. Moreover, one might well suppose that in the Commission's opinion a wide increase of new trials, and a simplification of appellate procedure so that new trials can be more easily secured, is about all that is needed.

The report ends with five conclusions and fourteen recommendations. The conclusions call for (1) improvement in methods of selecting judges; (2) a recognition of the importance of the inferior courts; (3) a "modern organization" of these courts; and (4) an extension of power of judges and magistrates. (5) The fifth conclusion states that as to "details of procedure we make no specific recommendation, but as a general reform, applicable to the whole country, the details of procedure should be left to rules of court . . ." This conclusion, entirely unsupported by fact or argument, again indicates the inadequacy of the report in its attempt, so casually, to dispose of such a large and important field as criminal procedure and administration.

The fourteen recommendations follow generally the subjects considered in the body of the report and provide constructive suggestions for improvement, which well merit the attention of legislators and others who are interested.

1. Italics ours.

AMERICAN BAR ASSOCIATION JOVRNAL

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"AND/OR"

Mr. Justice O'Connor of the Appellate Court of Illinois has recorded his timely protest against the increasing misuse of the labor-saving (?) symbol "and/or." He said:

"Before affirming the decree in this case we feel impelled to say that in the last few years the words 'and/or' have with increasing frequency crept into legal documents, including pleadings and even instructions to the jury . . . We must condemn the use of the words 'and/or' because they tend to confuse and mislead . . . In a close case where these words are used, a situation may be presented that would warrant this court in reversing a judgment or decree."

He refers to the case of State v. Dudley, 159 La. 872, in which it was said (page 878:)

"The expression 'and/or' is quite frequently used in contracts but we confess this is the first time we have ever found it in a legislative act. When used in a contract the intention is that the one word or the other may be taken, accordingly as the one or the other will best effect the purpose of the parties as gathered from the contract taken as a whole. In other words, such an expression in a contract amounts in effect to a direction to those charged with construing the contract to give it such an interpretation as will best accord with the equity of the situation and for that purpose to use either 'and' or 'or' and to be *held down to neither*. Such latitude in contracts is, of course, permissible to individuals, who may contract as they please, but not so with a legislature in making its laws; it must express *its own will* and leave nothing to the mere will or caprice of the courts, especially in the matter of punishing offenses."

If any one is curious as to the amount of uncertainty which may be imported into a statute by the use of this device, it will be worth while to examine the case for an exposition of the confusion thus imported into the Louisiana Criminal Code.

The Louisiana case was decided in 1925 and since that time we have observed its growing use in the statutes of a dozen different states. With regret we are compelled to note that even Congress has fallen into the use of this accuracy-destroying symbol.

The use of this symbol arises in part from a doubt as to which of the two words should be used. Is it any solution of this doubt to leave the question to be solved by construction at a later time?

We venture the assertion that any man who knows the meaning of the two words and the established distinctions in their use can take a modern contract or statute, bristling with this symbol, strike out every one of them and substitute the proper one of the two words, to the great clarification of the meaning of the instrument or act.

In short, we believe the symbol to be a device for the encouragement of mental laziness even in the drafting of private contracts, but against its use in pleadings and court proceedings and in legislative acts or in either of the foregoing categories, we join in the protest of Mr. Justice O'Connor.

LAWYERS AND PUBLIC OFFICE

The duty of lawyers in public office and in relation to public officers is one to which the attention of Grievance Committees has seldom been directed. Canons of Ethics, so far as we know, do not deal specifically with such relations. This is certainly true of the Canons of Ethics of the American Bar Association, though there are general terms relating to the duty of fidelity to private trust and to public duty which of course might be held to cover the subject.

The Illinois Bar Association, following the example of the Chicago Bar Association, has taken the position that something more specific is desirable. At its recent meeting, therefore, it adopted two new Canons of Ethics, viz: "Professional Representation of Governmental Bodies" and "The Lawyer in Public Office." These are the same as those previously adopted by the Chicago Bar Association, as a result of the investigation by its Special Committee on Public Law Offices of the scandal in the Legal Department of the Chicago Sanitary District.

It will be recalled that the investigation by this Committee revealed the fact that the Sanitary District Legal Department's pay-

roll was padded with the names of many lawyers who rendered little or no legal service for the generous salaries they received; also that the list of such lawyers included various members of the Legislature who might be called on to pass on legislation of importance to the District. In brief, the committee uncovered the too familiar spectacle of politicians playing politics with the public funds.

The investigation was followed by proceedings for disbarment of the offending members of the Bar before the Supreme Court of Illinois. The Supreme Court referred the matter to Judge Thomas Taylor of the Illinois Appellate Court in Chicago for report as a Master. Some time ago Judge Taylor presented the report, recommending the disbarment of several whom he regarded as most responsible for the conditions, and stern disciplinary action for most of the others. The matter is now before the State Supreme Court.

The Chicago and Illinois Bar Associations naturally and properly desired that an investigation conducted with such care and thoroughness, and revealing conditions calling so imperatively for professional reproof, should not pass into history as a mere sensational occurrence. They desired to preserve the gains of the Bar's long-continued effort by a specific enunciation of the principles plainly applicable to the situation of a lawyer holding public office or employment. It might be, of course, that any right thinking lawyer would be able to determine and define his duty under the circumstances. But much was to be gained, they naturally argued, by nailing these ethical and professional standards to the mast, as a constant reminder to those in public office or employment.

The additional canons just adopted by the Illinois Bar Association will be found in the report of the annual meeting of that organization in the Department of "News of State and Local Bar Associations" in this issue, where they may be read in full. The first elaborates the simple truth that a lawyer who receives a salary from a governmental body without rendering adequate service therefor is acting unethically and unprofessionally and ought to return the money and that such unearned salaries cannot be deemed a "retainer." Moreover, it is his duty "not to acquiesce in the wrongful diversion of its funds, and the duty is the more imperative when the diversion is made possible by his official act or failure to act."

The second canon—inspired largely by the revelation of members of the legislature on the Sanitary District payroll—emphasizes the duty of undivided allegiance on the part of a public officer, and particularly the impropriety of a lawyer who is also a legislator or office-holder acting "professionally for any person or corporation, including a municipal corporation, or for any other private or public body which is actively or specially interested in the promotion or defeat of legislation or other matters proposed or pending before the public body of which he is a member or by which he is employed, or before him as the holder of a public office or employment."

But lawyers not in public office or employment function quite frequently in dealings between private clients and public officers. The recent investigation into New York municipal affairs has resulted in a proposal by Mr. Samuel Seabury, counsel for the investigating committee, that the time honored and useful rule that communications between attorney and client should be regarded as "privileged" should be abrogated where the lawyer is representing a client seeking a contract or privilege from a public officer or official body. In a recent address at the banquet of the American Law Institute he said:

> "Experience has shown, and the investigations of municipal governments have revealed that the safest way to bribe a public official is to do it under the cover of the professional relationship. When inquiry into the matter is made, the professional relationship is invoked as a reason why the facts should not be disclosed. In consequence, we have a group of politically influential lawyers who are retained not for the exercise of legal knowledge or skill, but for their political influence, that is, to act as political brokers in public contracts and governmental favors."

The situation to which attention is thus called is certainly shocking and one which the profession can hardly ignore. Any suggestion coming from so able and informed a source should be given the most careful consideration. But such consideration should of course extend beyond the special situation which gave rise to the proposal, and the natural desire to reach those deemed guilty of public corruption, and take in the possible interest of the profession and the public in maintaining such a privilege in spite of its occasional prostitution by the unworthy.

REVIEW OF RECENT SUPREME COURT DECISIONS

Showing of Grievous Wrong, Evoked by New and Unforeseen Conditions, Necessary for Modification of Consent Decree Enjoining Act in Violation of Sherman Anti-Trust Act — Reapportionment of Congressional Election Districts in States Requires Gubernatorial Action, Where Governor Participates in Law-Making Process under State Law—Exclusion of Negroes from Political Party by Executive Committee in Texas Held Invalid under Fourteenth Amendment—Constitutional Validity of Longshoremen's and Harbor Workers' Compensation Act etc.

By Edgar Bronson Tolman*

Sherman Anti-Trust Act—Modification of Decree Enjoining Violation of Act

A decree enjoining acts in violation of the Sherman Anti-Trust Act, entered upon the consent of the defendants charged with violation, will not be modified in the absence of a showing that grievous wrong, evoked by new and unforeseen conditions, has resulted from the decree.

United States v. Swift & Co., et al., Adv. Op. 642; Sup. Ct. Rep. Vol. 52, p. 460.

This opinion, by Mr. Justice Cardozo, dealt with a petition of certain packing companies to modify a consent decree enjoining them from specified acts alleged to be in violation of the Sherman Anti-Trust Act. The Supreme Court of the District of Columbia granted part of the relief sought, and modified the decree so as to permit the defendant packing companies to deal at wholesale in a large number of groceries and commodities, in which the decree had forbidden them to engage, and to use and permit others to use their distributive facilities for dealing in such articles. On direct appeal to the Supreme Court, the decree of modification was reversed, leaving the original decree unmodified. Mr. Justice Butler delivered a dissenting opinion in which Mr. Justice Van Devanter concurred, while the Chief Justice, Mr. Justice Sutherland and Mr. Justice Stone did not participate in the case.

The consent decree was entered in 1920, upon a stipulation of the five leading packing companies, Swift & Company, Armour & Company, Wilson & Company, Morris Packing Company, and Cudahy Packing Company, setting forth the terms of the decree and providing that it should not constitute or be considered "as an adjudication that the defendants, or any one of them, have in fact violated any law of the United States." This was the result of a proceeding instituted by the government to prevent monopolistic control of the nation's supply of food other than meats, it being alleged that the defendants had already suppressed competition in the purchase of live stock and in the sale of dressed meats.

The decree enjoined the defendants from maintaining a monopoly and from entering into or continuing any combination in restraint of trade. It also enjoined the defendants jointly and severally from (1) holding any interest in public stockyard companies, stockyard terminal railroads, or market newspapers, (2) engaging in, or holding any interest in, the business of manufacturing, selling or transporting any of 114 enumerated food products (principally fish, vegetables, fruit and groceries), and thirty other articles unrelated to the meat packing industry; (3) using or permitting others to use their distributive facilities for handling any of the enumerated articles, (4) selling meat at retail, (5) holding any interest in any public cold storage plant, and (6) selling fresh milk and cream. Prohibition in respect of the sale or distribution of poultry, butter, cheese and eggs was omitted, though these were named in the bill as articles which the defendants sought to control. The decree closed with a provision for further relief at the foot thereof for carrying out and enforcing the decree, and for the purpose of entertaining any application made with reference to it by the parties.

Shortly after its entry, an attack was made on the decree when, in 1922, a petition was filed, by the California Co-operative Canneries Corporation, as intervener, alleging that the decree interfered with performance of a contract which it had with Armour & Company to buy large quantities of canned fruit. It moved that the decree be vacated for lack of jurisdiction, and later Swift and Armour moved for like relief, but the decree was upheld in 276 U. S. 311, and later, in 1929, an order of suspension of the decree was set aside.

Shortly after the setting aside of the suspension order the effort involved in the petition under review was made to modify the decree. It was brought on the theory that conditions in the packing industry and in the sale of groceries had so changed between 1920 and 1930 that the restraints of the decree had become useless and oppressive.

In reversing the decree of the District Supreme Court, Mr. Justice Cardozo pointed out that the power of a court of equity to modify such a decree was undoubted, even without the reservation contained in the decree in that behalf. He also pointed out that the Court could not accept the contention of certain wholesale grocers who were interveners, that the consent decree is to be treated as a contract.

> We reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act. A different view would not help them, for they were not parties to the contract, if any there was. All the parties to the consent decree concede the jurisdiction of the court to change it. The interveners gain nothing from the fact that the decree was a contract as to others, if it was not one as to them. But in truth what was then adjudged was not a contract as to any one. The consent is to be read as directed toward events as they

*Assisted by James L. Homire

then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.

Power to modify existing, we are brought to the question whether enough has been shown to justify its exercise.

In considering whether enough had been shown to justify an exercise of the power to modify the decree, MR. JUSTICE CARDOZO stated that two reasons for forbidding the defendants to engage in the grocery business were alleged in the bill of complaint. The first was that through ownership of refrigerator cars, branch houses and other facilities, the defendants could distribute substitute foods and other unrelated commodities with substantially no increase in overhead. The other reason was the practice followed by the defendants of fixing prices so low over limited periods of time as to eliminate competition by rivals less favorably situated. Both reasons were thought to have no less force now than when the decree was entered.

The fact that the defendants now compete with each other was thought to afford no reason for permitting them to deal in the forbidden products, since the size and past aggressions which had led to the prohibition are still present as factors to support the belief that rivals dealing in such products would be forced to the wall.

> We have said that the defendants are still in a position, even when acting separately, to starve out weaker rivals, or at least that the fear of such abuses, if rational in 1920, is still rational today. The meat monopoly has been broken, for the members now compete with one another. The size of the component units is substantially unchanged. In 1929, the latest year for which any figures are furnished by the record, the sales made by Swift and Armour, each, amounted to over a billion dollars; those made by all the defendants together to over $2,500,000,000; and those made by their thirteen chief competitors to only $407,000,000. Size and past aggressions induced the fear in 1920 that the defendants, if permitted to deal in groceries, would drive their rivals to the wall. Size and past aggressions leave the fear unmoved today. Changes there have been that reduce the likelihood of a monopoly in the business of the sale of meats, but none that bear significantly upon the old-time abuses in the sale of other foods. The question is not whether a modification as to groceries can be made without prejudice to the interests of producers of cattle on the hoof. The question is whether it can be made without prejudice to the interests of the classes whom this particular restraint was intended to protect. Much is made in the defendants' argument of the rise of the chain stores to affluence and power, and especially of chains for the sale of groceries and other foods. Nothing in that development eradicates the ancient peril. Few of the chain stores produce the foods they have for sale, and then chiefly in special lines. Much, indeed most, of what they offer, they are constrained to buy from others. They look to the defendants for their meats, and if the ban of this decree is lifted, they will look to the defendants for other things as well. Meats and groceries today are retailed at the same shops, departments of a single business. The defendants, the largest packers in the country, will thus hold a post of vantage, as compared with other wholesale grocers, in their dealings with the chains. They will hold a post of vantage in their dealings with others outside the chains. When they add groceries to meats, they will do so, they assure us, with substantially no increase of the existing overhead. Thus in the race of competition they will be able by their own admission to lay a handicap on rivals overweighted at the start. The opportunity will be theirs to renew the war of extermination that they waged in years gone by.

In conclusion, stress was placed upon the fact that the question before the Court was not what decree should be entered on the merits, but whether hardship had been shown so grievous as to justify a change in the decree.

> There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.
>
> The case comes down to this: the defendants had abused their powers so grossly and persistently as to lead to the belief that even when they were acting separately, their conduct should be subjected to extraordinary restraints. There was the fear that even when so acting they would still be ready and able to crush their feebler rivals in the sale of groceries and kindred products by forms of competition too ruthless and oppressive to be accepted as fair and just. Wisely or unwisely, they submitted to these restraints upon the exercise of powers that would normally be theirs. They chose to renounce what they might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall.
>
> What was then solemnly adjudged as a final composition of an historic litigation will not lightly be undone at the suit of the offenders, and the composition held for nothing.

In his dissenting opinion, MR. JUSTICE BUTLER emphasized that it was a stipulated fact that the defendants "are in active competition with each other," and that this negatived any suggestion of the existence of monopolistic control.

> In all branches of such activities there is strong and active competition. The use by defendants of their employees and facilities for the sale and distribution of groceries as well as meat would not give them any undue advantage over their competitors. Under present conditions the relief granted below would not enable them to inflict the evils of monopoly upon any part of the food industry. The denial of that relief makes against competition intended to be preserved by the Sherman Act. Defendants should be permitted more efficiently to use their help and equipment to lessen their operating expenses. That makes for lower prices and so is in the public interest.

MR. JUSTICE BUTLER also urged that wholesale grocers are not entitled to protection against competition of non-members of their associations.

> The wholesale grocers, represented here by objecting intervenors, are not entitled to the court's protection against the competition of non-members or of defendants carrying on separately and competing actively. They may not avoid the burden of sustaining themselves in a free and open market by protestation of fear that, if allowed to engage in the grocery business at all, defendants will unfairly compete in violation of the federal anti-trust laws. If and whenever shown necessary for the protection of the commerce safeguarded by the original decree, the Government may have the modified provisions restored or new ones added.

The case was argued by Mr. John Lord O'Brian, Assistant to the Attorney General, for the Government, by Mr. Edgar Watkins for the American Wholesale Grocers Association, by Mr. William C. Breed for the National Wholesale Grocers Association, and by Mr. Frank J. Hogan for Swift & Co. et al.

Constitutional Law—Reapportionment of Representatives in Congress—Redistricting

Under Article I, Section 4, of the Constitution, the function of prescribing districts for the election of Representatives in Congress is a law-making function, and where the state law provides that the governor shall participate in

the law-making process, an act prescribing new districts for the election of Representatives requires the approval of the governor, or the requisite majority for passage over his veto.

Under existing federal legislation, where a state has not been redistricted and is entitled to additional Representatives under the reapportionment of 1929, the old number of Representatives should be elected in existing districts, and the additional Representatives should be elected at large; but where it is entitled to a smaller number, the entire number should be elected at large.

Smiley v. Holm, Adv. Op. 600; Sup. Ct. Rep. Vol. 52, p. 397.

Koenig v. Flynn, Adv. Op. 608; Sup. Ct. Rep. Vol. 52, p. 403.

Carroll v. Becker, Adv. Op. 609; Sup. Ct. Rep. Vol. 52, p. 402.

The question presented for decision in these cases related to the validity of bills passed by state legislatures, without approval of the governors, dividing the states into new Congressional election districts, where, under the state law, the governor functions as part of the law-making process of the state.

The Federal Constitution, Article I, section 4, provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Congress, in 1911, enacted legislation for the apportionment of representatives under the thirteenth census, and provided that in case of an increase in the number of representatives in any state under that apportionment, the additional representatives "shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof" and in accordance with certain provisions of the Act of Congress of 1911.

Minnesota, under the reapportionment in 1929 under the fifteenth census, was entitled to one less representative than had been previously allotted to it.

The petitioner in the Smiley case as a "citizen, elector and taxpayer" of Minnesota brought an action in the state court to enjoin the State Secretary of State from giving notice of holding elections in the subdivisions, and to have declared invalid all filings for nominations in congressional districts of the state. He asserted that there had been no valid redistricting, since the bill passed by the legislature for that purpose in 1931 had been vetoed by the governor, and had not been repassed as required by law. The state courts held against the petitioner, chiefly upon the ground that the legislature in passing the redistricting bill was performing a special function conferred upon it by the Federal Constitution, and that when so acting it is not performing a law-making function requiring approval by the governor for its validity.

Reviewing the case on certiorari, the Supreme Court, in an opinion by MR. CHIEF JUSTICE HUGHES, reversed the judgment. Reversal was based chiefly upon the ground that redistricting is a law-making function, requiring approval by the governor in the usual manner, when, under the state law, action by the governor is a necessary part of the law-making process. In dealing with the question, it was observed that seven times previous to the present case redistricting acts have been passed in Minnesota "in the form of a bill for an act which was approved by the Governor."

After observing that the Minnesota Court regarded the provision of the Federal Constitution as determinative, the Chief Justice declared that the function performed is the important factor to consider in arriving at the meaning of the term "legislature" as used in various provisions of the Constitution. In this regard, and holding the function here to be a law-making function, he said:

> The question then is whether the provision of the Federal Constitution, thus regarded as determinative, invests the legislature with a particular authority and imposes upon it a corresponding duty, the definition of which imports a function different from that of lawgiver and thus renders inapplicable the conditions which attach to the making of state laws. Much that is urged in argument with regard to the meaning of the term "Legislature" is beside the point. As this Court said in Hawke v. Smith, No. 1, 253 U. S. 221, 227, the term was not one "of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people." The question here is not with respect to the "body" as thus described but as to the function to be performed. The use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function. The legislature may act as an electoral body, as in the choice of United States Senators under Article I, section 3, prior to the adoption of the Seventeenth Amendment. It may act as a ratifying body, as in the case of proposed amendments to the Constitution under Article V. . . . It may act as a consenting body, as in relation to the acquisition of lands by the United States under Article I, section 8, paragraph 17. Wherever the term "legislature" is used in the Constitution it is necessary to consider the nature of the particular action in view. The primary question now before the Court is whether the function contemplated by Article I, section 4, is that of making laws. . . . The term defining the method of action, equally with the nature of the subject matter, aptly points to the making of laws. The state legislature is authorized to *"prescribe"* the times, places and manner of holding elections. Respondent urges that the fact that the words *"by law"* are found in the clause relating to the action of the Congress, and not in the clause giving authority to the state legislature, supports the contention that the latter was not to act in the exercise of the lawmaking power. We think that the inference is strongly to the contrary. It is the nature of the function that makes the phrase *"by law"* apposite. That is the same whether it is performed by state or national legislature, and the use of the phrase places the intent of the whole provision in a strong light. Prescribing regulations to govern the conduct of the citizen, under the first clause, and making and altering such rules by law, under the second clause, involve action of the same inherent character.

After referring to the course heretofore followed by the states, affording a practical construction of Article I, section 4, in support of the conclusion reached here, the interpretation placed on the provision by Congress by the Act of 1911 was also discussed.

> That the constitutional provision contemplates the exercise of the lawmaking power was definitely recognized by the Congress in the Act of August 8, 1911, which expressly provided in section 4 for the election of representatives in Congress, as stated, "by the districts now prescribed by law until such state shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act." The significance of the clause "in the manner provided by the laws thereof" is manifest from its occasion and purpose. It was to recognize the propriety of the referendum in establishing congressional districts where the State had made it a part of the legislative process. "It is clear," said this Court in *Davis v. Hildebrant,* 241 U. S. 565, 568, "that Congress in 1911 in enacting the controlling law concerning the duties of the States through their legislative authority, to deal with the subject of the creation of congressional districts expressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that where by the state constitution and laws the referendum was treated as part of the legislative power, the power as thus constituted

should be held and treated to be the state legislative power for the purpose of creating congressional districts by law."

In conclusion, a question relating to the force and application of the act of 1911 was considered. As to this it was pointed out that the Act of 1929 repealed only such laws or parts of laws as were inconsistent with it, and that the Act of 1911 provided that in case a state should be entitled to a greater number of representatives, the additional number should be elected by the State at large, and the others by the districts then existing until the State should be redistricted. Adoption of the same plan under the 1929 apportionment was thought to present no inconsistency with the policy declared in the Act of 1911. Where, however, the number of representatives has been decreased, the entire number is to be elected at large.

> Where, as in the case of Minnesota, the number of representatives has been decreased, there is a different situation as existing districts are not at all adapted to the new apportionment. It follows that in such a case, unless and until new districts are created, all representatives allotted to the State must be elected by the State at large. That would be required, in the absence of a redistricting act, in order to afford the representation to which the State is constitutionally entitled, and the general provisions of the Act of 1911 cannot be regarded as intended to have a different import.

Koenig v. Flynn involved a similar question as to redistricting of New York, which was entitled to two more representatives than it had been previously. There the Court decided that the old number should be elected from the existing districts, and that the two new representatives should be elected at large, in the absence of a valid redistricting act. The ruling of the State Court was affirmed.

In the case of Missouri, dealt with in *Carroll v. Becker*, the new number of representatives was thirteen, under the new apportionment, instead of sixteen as theretofore. The State Supreme Court ruled that all the representatives should be elected at large, and its decision was affirmed under the ruling in *Smiley v. Holm*.

MR. JUSTICE CARDOZO took no part in these cases in the Supreme Court.

Smiley v. Holm, was argued by Mr. George T. Simpson and Mr. Alfred W. Bowen for the petitioner, and by Mr. Harry N. Benson, Attorney General of Minnesota, and Mr. William H. Gurnee for the respondent.

Koenig v. Flynn was argued by Mr. Abraham S. Gilbert and Mr. Benjamin L. Fairchild for the petitioners, and Mr. Henry Epstein for the respondents.

Carroll v. Becker was argued by Mr. Hyman G. Stein and Mr. Edward F. Colladay for the petitioner and by Mr. Ray Weightman for the respondent.

Political Parties—Determination of Qualifications for Membership—Exclusion of Negroes by Executive Committee

The state executive committee of a political party has no inherent power to determine the qualifications for membership in the party. Where a state statute confers such power on the executive committee, the latter becomes an agency of the state within the meaning of the restraints imposed on the states by the Fourteenth Amendment, and a resolution of the committee that white persons and none other shall be entitled to vote at party primary elections is invalid under the provisions of that Amendment.

Nixon v. Condon, et al. Adv. Op. 629: Sup. Ct. Rep., Vol. 52, p. 484.

In this case was involved the constitutional validity of a statute of Texas and action taken under authority of such statute relating to qualifications for voting at primary elections. It will be recalled that in *Nixon v. Herndon*, 273 U. S. 536, at the suit of the petitioner in this case, the Court held void a statute of Texas which provided that "in no event shall a negro be eligible to participate in a democratic party primary election." Promptly thereafter the legislature repealed that statute and enacted the statute involved here. The latter provides that:

> Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party.

Pursuant to authority conferred by such provisions the State Executive Committee of the Democratic party adopted a resolution that all qualified "white democrats . . . and none other, be allowed to participate in the primary elections. . . ." The petitioner, a Negro, qualified to vote at the primary unless disqualified by the resolution of the Committee, presented himself at the polls and requested a ballot. The judges of the election, respondents, refused to furnish the ballot on the ground that the petitioner was not qualified to vote by reason of the resolution. He then brought an action to recover damages from the judges of the election for their refusal to let him vote.

The district court dismissed the action and its judgment was affirmed by the circuit court of appeals. On certiorari the Supreme Court, by a divided bench, reversed the judgment, in an opinion by MR. JUSTICE CARDOZO.

In approaching the question, MR. JUSTICE CARDOZO summarized the arguments advanced in support of the statute and action of the Committee, saying:

> Barred from voting at a primary the petitioner has been, and this for the sole reason that his color is not white. The result for him is no different from what it was when his cause was here before. The argument for the respondents is, however, that identity of result has been attained through essential diversity of method. We are reminded that the Fourteenth Amendment is a restraint upon the States and not upon private persons unconnected with a State. . . . This line of demarcation drawn, we are told that a political party is merely a voluntary association; that it has inherent power like voluntary associations generally to determine its own membership; that the new article of the statute, adopted in place of the mandatory article of exclusion condemned by this court, has no other effect than to restore to the members of the party the power that would have been theirs if the law-makers had been silent; and that qualifications thus established are as far aloof from the impact of constitutional restraint as those for membership in a golf club or for admission to a Masonic lodge.

The petitioner argued that other provisions of the state election law have withdrawn the privilege of determining without restraint what the qualifications for membership shall be, and that though a party is free to define for itself the political tenets of its members, it may not deny its privileges to those who profess its tenets. The Court, however, proceeded upon a narrower ground.

> A narrower base will serve for our judgment in the cause at hand. Whether the effect of Texas legislation has been to work so complete a transformation of the concept of a political party as a voluntary association, we do not now decide. Nothing in this opinion is to be taken as carrying with it an intimation that the court is ready

> or unready to follow the petitioner so far. As to that, decision must be postponed until decision becomes necessary. Whatever our conclusion might be if the statute had remitted to the party the untrammeled power to prescribe the qualifications of its members, nothing of the kind was done. Instead, the statute lodged the power in a committee, which excluded the petitioner and others of his race, not by virtue of any authority delegated by the party, but by virtue of an authority originating or supposed to originate in the mandate of the law.

Attention was then called to the fact that the State convention of the party, and not the Executive Committee, has such inherent power as exists to determine qualifications for membership, and that since the State convention has never voted to bar Negroes, their exclusion, if valid, was by reason of legislative action conferring that extraordinary power on the Executive Committee.

> Whatever power of exclusion has been exercised by the members of the committee has come to them, therefore, not as the delegates of the party, but as the delegates of the State. Indeed, adherence to the statute leads to the conclusion that a resolution once adopted by the committee must continue to be binding upon the judges of election though the party in convention may have sought to override it, unless the committee, yielding to the moral force of numbers, shall revoke its earlier action and obey the party will. Power so intrenched is statutory, not inherent. If the State had not conferred it, there would be hardly color of right to give a basis for its exercise.

An examination of the State decisions defining the powers of committees resulted in the opinion that, in the view most favorable to the respondents, they were inconclusive, and failed to support the proposition that the committee has inherent power to specify qualifications for membership.

In conclusion MR. JUSTICE CARDOZO summarized the considerations which the majority of the Court thought controlling, and emphasized especially that the committee acted, not as directors of a corporation in a matter of private concern, but in matters of public interest, which made them subject to the restraints of the Fourteenth and Fifteenth Amendments.

> The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power. They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere. They are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly. Whether in given circumstances parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this court will determine for itself. It is not concluded upon such an inquiry by decisions rendered elsewhere. The test is not whether the members of the Executive Committee are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action.
>
> With the problem thus laid bare and its essentials exposed to view, the case is seen to be ruled by *Nixon v. Herndon, supra*. Delegates of the State's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black. . . . The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color.

MR. JUSTICE MCREYNOLDS delivered a dissenting opinion in which MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND, and MR. JUSTICE BUTLER concurred.

In this opinion MR. JUSTICE MCREYNOLDS urged the view that the petitioner's exclusion from the primary was not action by the State, and that therefore there had been no violation of the Fourteenth Amendment. Summarizing his understanding of the majority opinion and his objection to it, MR. JUSTICE MCREYNOLDS said:

> The argument for reversal is this—
>
> The statute—Chap. 67, present Article 3107—declares that every political party through its State Executive Committee "shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party." The result, it is said, is to constitute the Executive Committee an instrumentality of the State with power to take action, legislative in nature, concerning membership in the party. Accordingly, the attempt of the Democratic Committee to restrict voting in primaries to white people amounted to State action to that effect within the intendment of the Federal Constitution and was void under *Nixon v. Herndon, supra*.
>
> This reasoning rests upon an erroneous view of the meaning and effect of the statute.
>
> In *Nixon v. Herndon* the Legislature in terms forbade all negroes from participating in Democratic primaries. The exclusion was the direct result of the statute and this was declared invalid because in conflict with the Fourteenth Amendment.
>
> The act now challenged withholds nothing from any negro; it makes no discrimination. It recognizes power in every political party, acting through its Executive Committee, to prescribe qualifications for membership, provided only that none shall be excluded on account of former polical views or affiliations, or membership or non-membership in any non-political organization. The difference between the two pronouncements is not difficult to discover.
>
> Nixon's present complaint rests upon the asserted invalidity of the resolution of the Executive Committee and, in order to prevail, he must demonstrate that it amounted to direct action by the State.

Following a discussion of the history of election laws in Texas and decisions of her courts, to emphasize the view that political parties are political instrumentalities rather than state or governmental agencies, MR. JUSTICE MCREYNOLDS urged that their general powers are not derived from the State, and that restrictions upon or recognition of the powers of such parties do not constitute grants of power.

> If statutory recognition of the authority of a political party through its Executive Committee to determine who shall participate therein gives to the resolves of such party or committee the character and effect of action by the State, of course the same rule must apply when party conventions are so treated; and it would be difficult logically to deny like effect to the rules and by-laws of social or business clubs, corporations, and religious associations, etc., organized under charters or general enactments. The State acts through duly qualified officers and not through the representatives of mere voluntary associations.
>
> Such authority as the State of Texas has to legislate concerning party primaries is derived in part from her duty to secure order, prevent fraud, etc., and in part from obligation to prescribe appropriate methods for selecting candidates whose names shall appear upon the official ballots used at regular elections.
>
> Political parties are fruits of voluntary action. Where there is no unlawful purpose, citizens may create them at will and limit their membership as seems wise. The State may not interfere. White men may organize; blacks may do likewise. A woman's party may exclude males. This much is essential to free government.
>
> If any political party as such desires to avail itself of the privilege of designating candidates whose names shall be placed on official ballots by the State it must yield to reasonable conditions precedent laid down by the statutes. But its general powers are not derived from the State and proper restrictions or recognition of powers cannot become grants.
>
> It must be inferred from the provisions in her statutes and from the opinions of her courts that the State of Texas

has intended to leave political parties free to determine who shall be admitted to membership and privileges, provided that none shall be excluded for reasons which are definitely stated and that the prescribed rules in respect of primaries shall be observed in order to secure official recognition of nominees therein for entry upon the ballots intended for use at general elections.

By the enactment now questioned the Legislature refrained from interference with the essential liberty of party associations and recognized their general power to define membership therein.

The words of the statute disclose such purpose and the circumstances attending its passage add emphasis. The act of 1923 had *forbidden* negroes to participate in Democratic primaries. *Nixon v. Herndon* (March, 1927) *supra.* held the inhibition invalid. Shortly thereafter (June, 1927) the Legislature repealed it and adopted the Article now numbered 3107 (Rev. Stats. 1928) and here under consideration. The fair conclusion is, that accepting our ruling as conclusive the lawmakers intended expressly to rescind action adjudged beyond their powers and then clearly to announce recognition of the general right of political parties to prescribe qualifications for membership. The contrary view disregards the words, that "every political *party* . . . shall in its own way determine who shall be qualified to vote or otherwise participate in such political party"; and really imputes to the Legislature an attempt indirectly to circumvent the judgment of this Court. We should repeal this gratuitous imputation; it is vindicated by no significant fact.

The notion that the statute converts the Executive Committee into an agency of the State also lacks support. The language employed clearly imports that the political party, not the State, may act through the Committee. As shown above since the Act of 1903 the Texas laws have recognized the authority of Executive Committees to announce the party will touching membership.

And if to the considerations already stated there be added the rule announced over and over again that when possible statutes must be so construed as to avoid unconstitutionality, there can remain no substantial reason for upsetting the Legislature's laudable effort to retreat from an untenable position by repealing the earlier act, and then declare the existence of party control over membership therein to the end that there might be orderly conduct of party affairs including primary elections.

The resolution of the Executive Committee was the voice of the party and took from appellant no right guaranteed by the Federal Constitution or laws. It was incumbent upon the judges of the primary to obey valid orders from the Executive Committee. They inflicted no wrong upon Nixon.

The case was argued by Mr. James Marshall for the petitioner both on original argument and reargument, by Mr. Nathan R. Margold for petitioner on reargument, and by Mr. Ben R. Howell for the respondent on reargument.

Longshoremen's Act — Constitutional Validity — Procedure for Determination of Facts Conferring Jurisdiction on Deputy Commissioner

The provisions of the Longshoremen's Act requiring employers to pay compensation for death or injury sustained by employees in the course of their employment on the navigable waters of the United States, irrespective of fault on the part of the employer as the cause of the injury, constitute a proper exercise of the power of Congress to alter and revise the maritime law, and are valid under the due process clause of the Fifth Amendment.

Since the basis of the power of Congress to enact such legislation is the existence of the relation of employer and employee in maritime employment, or some other appropriate relation, the existence of such an appropriate relation is indispensable to the deputy commissioner's jurisdiction to award compensation in cases under the act. The determination of the existence of such relation, involving as it does the constitutional power of Congress to legislate concerning a case, is a judicial question which may be tried de novo in the federal court.

To avoid serious doubts as to the constitutional validity of the Act, it is construed as providing for trial de novo in the federal court on an issue raised as to the existence of the employer-employee relation. The essential independence of the exercise of the judicial power requires that the federal court shall determine that issue on its own record and the facts elicited before it.

Crowell v. Benson, Adv. Op. 369; Sup. Ct. Rep. Vol. 52, p. 285.

In this opinion the Court considered the constitutional validity of the Longshoremen's and Harbor Workers' Compensation Act, and the jurisdiction thereunder of the United States Employees' Compensation Commission. The validity of the Act was upheld in an opinion by the CHIEF JUSTICE. As to the validity of the Act there was no dissenting opinion. But as to the construction of the Act, relating to trials *de novo* on certain questions affecting the jurisdiction of the Commission dissent was expressed in an opinion by MR. JUSTICE BRANDEIS, in which MR. JUSTICE STONE and MR. JUSTICE ROBERTS concurred.

The questions were raised in a suit to enjoin enforcement of an award for personal injury made by the petitioner Crowell, as deputy commissioner, in favor of the petitioner Knudsen against the respondent Benson. The suit to enjoin enforcement of the award was brought upon the ground that it was contrary to law, for the reason that at the time the injury occurred Knudsen was not an employee of Benson and that his claim was not "within the jurisdiction" of the deputy commissioner.

The grounds upon which the Act was challenged were that it violated: (1) the due process clause of the Fifth Amendment; (2) the provision of the Seventh Amendment as to trial by jury; (3) the Fourth Amendment as to unreasonable search and seizure; and (4) Article III as to the judicial power of the United States.

The district court granted a hearing *de novo* upon the facts and the law, and, after hearing the evidence, ruled that Knudson was not in the employment of the petitioner, and restrained enforcement of the award. The decree was affirmed by the circuit court of appeals, and its decree was affirmed by the Supreme Court on certiorari.

The most important aspect of the case is that relating to the preservation of the judicial power and for the details of other questions discussed the reader is referred to the opinion itself.

Objections to the procedural requirements of the Act related to the extent of the administrative authority which it confers. These requirements are summarized in the majority opinion. Among them is a provision that in the absence of substantial evidence to the contrary it shall be presumed that the claim comes within the provisions of the Act, that sufficient notice of the claim has been given, and that the injury was not occasioned solely by the intoxication of the injured employee, or by the willful intention of such employee to injure or kill himself or another. It is also provided that if default is made in the payment of compensation a supplementary order may be made declaring the amount in default. When a certified copy of the supplementary order has been filed with the clerk of the Federal Court a judgment is to be entered for the amount specified, if the supplementary order "is in accordance with law." If not in accordance with law it may be suspended or set aside through injunction proceedings. Review of the judgment is

provided for as in civil cases for damages at common law.

After discussing other questions regarding the Act, the extent to which it purports to withdraw certain phases of the cases from the cognizance of judicial power was considered in the light of the constitutional limitations on such withdrawal. The Act was construed as providing that the determination of the employer-employee relation shall rest with the courts, in order to avoid serious doubts as to constitutionality, since the power of Congress to enact legislation covering the subject matter was thought dependent on the existence of that relation. Recognizing that although the determination of certain facts may in many cases be referred to administrative tribunals, a vital distinction was taken as to facts which are the constitutional foundation of the statutory scheme.

> These fundamental requirements are that the injury occurs upon the navigable waters of the United States and that the relation of master and servant exists. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (Sec. 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.
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> In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction. Not only is navigability itself a question of fact, as waters that are navigable in fact are navigable in law, but, where navigability is not in dispute, the locality of the injury, that is, whether it has occurred upon the navigable waters of the United States, determines the existence of the congressional power to create the liability prescribed by the statute. Again, it cannot be maintained that the Congress has any general authority to amend the maritime law so as to establish liability without fault in maritime cases regardless of particular circumstances or relations. It is unnecessary to consider what circumstances or relations might permit the imposition of such a liability by amendment of the maritime law, but it is manifest that some suitable selection would be required. In the present instance, the Congress has imposed liability without fault only where the relation of master and servant exists in maritime employment and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute and, in the absence of any other justification, underlies the constitutionality of this enactment. If the person injured was not an employee of the person sought to be held, or if the injury did not occur upon the navigable waters of the United States, there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault upon his part, to the liability which the statute creates.
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> In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizens depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law. . .
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> In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to "a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts."

In conclusion the question whether jurisdiction should be determined on the basis of the record before the deputy commissioner or upon a trial *de novo* was considered. With respect to this it was noted that the statutory remedy afforded in the case of an invalid award is not an appeal or a writ of certiorari, but through injunction proceedings, which was taken as indicating that Congress contemplated that the complainant should have full opportunity to show that the case was not within the Act. Determination of the question of jurisdiction on an independent record was thought essential to the exercise of the judicial power.

> We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it.

In his dissenting opinion MR. JUSTICE BRANDEIS stated that the essential issue in the case related to what record should be the basis of district courts' review of the order of the deputy commissioner.

In support of the view that review of the order should be based upon the record before the deputy commissioner questions of statutory construction and constitutional law were both considered in detail.

Several considerations were referred to to indicate that, properly construed, the statute was not intended to provide a trial *de novo* as to the existence of the employer-employee relation at the time of the injury. First, attention was called to the fact that the statute contains no express declaration that there shall be a trial *de novo* on that or any other issue. The requirement that the order shall be suspended if not "in accordance with law" was said to be adopted from the provision relating to review by the Circuit Courts of Appeals of decisions of the Board of Tax Appeals, in which connection it has been construed to mean a review on the record before the Board.

It was suggested also that the prescribed safeguards surrounding the hearings before the deputy commissioner would be meaningless if those proceedings were to serve merely as an inquiry preliminary to a contest in the courts, and that such repetition would tend to defeat the purpose of the Act to expedite relief.

Dissent was also expressed from the proposition that the statute should be construed to afford a trial *de novo* on the issue to avoid invalidity or serious doubt as to validity on constitutional grounds. While recognizing the propriety of that rule of construction in cases where a statute is equally susceptible of two constructions, its applicability was denied here, upon the ground that it would amount to a remaking rather than a construction of the statute.

MR. JUSTICE BRANDEIS also stated that in his opinion the determination of the existence of the employer-employee relation does not involve a constitutional right, and that, even if it does, the due process

(*Continued on page* 472)

COORDINATION OF THE BAR: AN ANCIENT HOPE AND A FUTURE PROSPECT

Brief Summary of the Most Significant Utterances on the Subject of Coordination—The Ideal of the Founders—Question Treated in Addresses of Presidents Davis and Saner—Elihu Root's Declaration at Chicago of the Necessity of Welding the Separate Bars into One Body of Common Understanding—Appointment of Special Committee to Ascertain Sentiment and Evolve Plan—Reports and Recommendations—Action of General Council

By David Andrew Simmons
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ON July 1, 1878, a circular letter, prepared by Simeon E. Baldwin, of Connecticut, and signed by fourteen distinguished lawyers, was sent to six hundred and seven members of the bar, scattered throughout the United States. It suggested that a body of delegates, representing the profession in all parts of the country, should meet annually for a comparison of views and for friendly intercourse. The meeting was held at Saratoga Springs, New York, with a preliminary registration of seventy-five, which, however, grew to two hundred ninety-one before the conference closed. It is noteworthy that Louisiana, the farthest state represented, led with an enrollment of thirty-five. Among other matters of business transacted, following the adoption of a constitution, the Executive Committee was directed to report measures for establishing close relations between the Association and the bar associations of the several states.[1]

The ideal of the founders,—that the American Bar Association should consist of delegates from all parts of the country,—is still unrealized after fifty-four years. The Association is now, and ever has been, an organization of individual members, having no organic connection with state and local associations. Whether there is a trend in the direction of the initial thought is the subject of inquiry of this paper.

In 1879 full privileges of membership at Annual meetings were extended to any three delegates accredited by state associations. The idea was not followed up; and, for all practical purposes, the delegate idea died out until the formation of the Conference of Bar Association Delegates, in 1916, under the direction of Elihu Root, then president of the Association.[2]

Meanwhile, the national association was developing along strong voluntary lines. Distinct eras of growth through the first fifty years are traced by James Grafton Rogers, in an address at the Semi-Centennial meeting.[3] He pictures 1878 to 1892 as the foundation period, with growth slow and the organization largely social. The presidents and leaders were outstanding characters, and colorful figures of Civil War fame. The second period, 1893 to 1904, was one of nationalization. The orators of the Civil War days had passed along, and been supplanted by advocates. Membership climbed slowly from one thousand to two thousand; and Saratoga was no longer the only meeting place. Occasional meetings were being held in the middle South and West. The third period, from the St. Louis meeting, in 1904, to that in Montreal, in 1913, was one of rapid growth, and witnessed the advent of the business lawyer. The membership increased from two thousand to eight thousand. In Rogers' opinion, the fourth period, 1914 to the foreign pilgrimage in 1924, witnessed the full fruition of the Association as a voluntary organization, functioning through an individual membership. The growth was from eight to twenty thousand; the American Bar Association Journal had been founded, and had grown into an instrumentality of great importance; and the bar had become conscious of the stronger affiliations and professional groupings abroad. The Association was becoming unwieldly. The need for solidarity, for reorganization of some kind began to manifest itself. A voice here and a voice there suggests this plan and that. Whose are the voices, and what are the plans?

John W. Davis, in his presidential address in 1923, recommended a federation with state associations, and appointed a special committee to devise a plan for cooperation, the committee consisting of former Presidents Severance and Root, Dean Wigmore, and Messrs. Could and Hubbard. The committee reported that it had met with a similar committee appointed by the Conference of Bar Association Delegates, and suggested that the American Bar Association, as presently organized, could not reach a sufficient membership to be effective as the representative of the profession. Ultimately, it believed the federalized form of the medical profession would be adopted by the lawyers. Meanwhile, it proposed that the members of the General Council should be elected by the several state bar associations; in default of such selection, the councilman would be chosen by a caucus at the Annual

1. See Francis Rawle, How The Association Was Organized (1928) 14 A. B. A. Journal, p. 375.
2. For the Proceedings of Conference, see American Bar Association Reports, Vol. 41 (1916) pp. 7-18, 588-651.
3. James Grafton Rogers, Fifty Years of the American Bar Association, (1928) 14 A. B. A. Journal, p. 521.

meeting. This amendment was approved by the Executive Committee, and by the Association, but the next day was reconsidered and tabled after a long debate. The principal opposition was based on the ground that such a plan would surrender control of the national association to the state associations.[4]

In 1924, as an appendix to his presidential address, R. E. L. Saner published a memorandum on national bar federalization, and suggested organization as the way by which the bar should resume its lost leadership. He considered in detail the plan of the American Medical Association, and recommended that it be followed in its major outlines. Advantages accruing from coordination included increase in membership, authoritative representation of the profession, more effective machinery, improved publications, financial strength, elimination of duplicated efforts, establishment of central bureaus of information dealing with personnel, admissions, disbarments, and the exchange of current thought and ideas in the profession. He pointed out that the major problem to be solved was how to reconcile the representative idea of functioning through delegates, with the right of every active member of the Association to attend and have a full share in the Annual meeting. He suggested as a working idea that each state appoint delegates, but that all members from each state meet in caucus prior to the business meetings of the national body, and decide pending questions of importance, and authorize the member of the General Council, or the state Vice-President, to cast the vote of the delegation in case of a formal roll call; each state, under this plan, to have a vote proportionate to its membership.

The need of representative government for the bar has been the subject of considerable comment. In 1929, an analysis of the Annual meetings of the American Bar Association was made, in which it was pointed out that a majority of those in attendance come from places within three hundred miles of the convention city.[5] In 1928, the State of Washington registered six hundred sixty-one out of a total of one thousand, two hundred seventy-two, slightly more than fifty per cent; while the year before, at Buffalo, there was only one Washingtonian present. That is only a slightly exaggerated instance of the situation at Annual meetings. Although from a thousand to twenty-five hundred lawyers now register at the conventions, the business sessions seldom find more than four or five hundred present. The routine of the meeting is suddenly broken by sharp debate on some resolution concerning policy, or some recommendation concerning legislation; a vote is called for, and the mattter is decided by three or four hundred lawyers, each of whom represents only himself. With a total membership of twenty-five to thirty thousand, it is incredible that such a condition should exist. If the three or four hundred present were the chosen representatives of all parts of the country, and of all members of the Association, it would be an entirely different matter. Then it might be said with some semblance of truth that the result was the action of the American Bar Association. In a nation where the views of the people on agriculture, finance, industry, transportation, politics, religion, government, laws, prohibition, and what not, are largely influenced by environment, it takes but half an eye to see that a national organization, functioning in such a manner, is treading on dangerous ground.

Philip J. Wickser, of Buffalo, in April, 1930, published in the Cornell Law Quarterly a comprehensive and scholarly treatise on the history of bar organizations. This article pointed out that local and state associations have increased in number much more rapidly in the last thirty years than has the profession, or the population of the country; and this has focused attention on the subject of organization itself. At the present time, there are selective voluntary associations, compulsorily incorporated bars, and federated bars. Consideration of the problem starts with the recognition of the fact that the lawyer is an individualist, whose thoughts, like his activities and professional duties, are largely personal. His background comprehends two centuries of pioneer life and thought, wherein individual action is the mainspring of society.

Wickser traces the history of various local, state, and national associations from colonial times, and points out the significant characteristics of the period between the Revolutionary and Civil Wars were: 1—the development of an individualistic bar in an individualistic community; 2—unrelated and fitful attempts to organize, often unsuccessful, but generally all-inclusive in theory; 3—practically no evidence of selective associations, at least in their purposive aspects; and 4—some claim to control standards of education, admissions, and discipline, which melted away before a philosophy of pure democracy. He points out that following the Civil War a need for some control over the unrestrained philosophy of the pioneer and social democrat at the bar began to manifest itself, since a certain amount of jostling had become noticeable within the area reserved for the bar,—jostling which had its economic aspects for the leaders, as well as for the rank and file.

This revulsion against low professional standards, and a concurrent reaction against national, state, and municipal political corruption were among the chief forces which gave rise to a new instrumentality of the bar,—the selective voluntary association. Wickser notes that for a period of fifty years the idea of a selective association was dominant, and its primary object was to maintain the honor and dignity of the profession. Not until the decade following the World War did the old idea of the all-inclusive bar reassert itself. The voluntary groups accomplished many things of great value to the profession. They improved the standards of admission, provided forums for discussion, shaped procedural and substantive legislation, encouraged uniform laws, adopted canons of ethics and elevated the professional standards, and, in some instances, endorsed and secured the election of judicial candidates.

He traces the development of the statutory bars during the past ten years, and cites the outstanding features: every practicing lawyer is a member; in form it is a representative organization; it has control over admission and discipline; it yields adequate revenue without undue burden

4. John W. Davis, Annual Address as President, American Bar Association Reports, Vol. 48 (1923) p. 194; Committee Report, pp. 473-475; Debate, pp. 23, 76-88.

5. D. A. Simmons, Representative Government for the Bar, Journal of Amer. Jud. Society, Vol. XIII, p. 74; Texas Bar Association Reports, Vol. 48, p. 244-250.

on anyone; and it places responsibility squarely on the whole profession.

The third development is the federation of local associations. These federations provide regional forums; ethics and grievance committees, which are neither coldly state-wide, nor impotently local; meetings within easy reach of the membership; and preservation of the integrity of local opinion within the profession.

Considering these three types of development, Wickser points out that the task of coordinating them is primarily one of relation, but concludes that when the American Bar Association has informed itself of the conditions as they actually exist in each state, it can treat with that state and, hence, integrate the profession, whether the local units are incorporated, federal, or voluntary.

It must be borne in mind that organization is not an end in itself, but a means to an end; and that end is the development of professional consciousness and the regaining of lost leadership. Leadership had been lost because of the failure of the bar to discharge its collective responsibility to the public. Leadership in the administration of justice is a great employment, but that alone should not satisfy a profession which once charted the course of government, philosophy, and social progress. Leaders of the bar once debated the leading questions of the day, and crystalized sentiment to the point of action, and then directed its course. Charters of liberty, declarations of independence, constitutions, and treatises on national and international problems, were the products of a learned and valiant profession. A consideration of the present problems in the Far East, adhesion to the World Court or the League of Nations, would be in keeping with our heritage, incongruous as the idea appears.

As Chief Justice Hughes once said: "We wish the entire bar to have a voice, a commanding voice. We desire the concentration of influence."[6]

In his address, as chairman of the Conference of Bar Association Delegates in 1929, James Grafton Rogers traced the demand for reorganization in the American Bar Association.[7] He states that the machinery of the organization, for all practical purposes, was the same as it had been in 1878, and was typical of the ordinary social club. He gave a detailed analysis of the medical and engineering associations, and pointed out that they were federations of local units, and noted that those professions were effective by reason of close organization; the American Medical Association membership of ninety-six thousand representing sixty-three per cent of the doctors, while the engineers, with fifty-seven thousand members in the federation, represented thirty-five per cent of that profession. Rogers closed his address with the statement that he had no formula to propose, no campaign to inaugurate, and no crusade to make, but that he was inclined to think that the American Bar had not kept pace in its machinery with its own needs or its national responsibility.

In February, 1930, the Journal of the American Judicature Society, a publication whose editor, Herbert Harley, had long advocated closer organization of the Bar, and whose pages for years had been a forum for discussion, in a comprehensive article reviewed the history of the national body, the addition and purpose of sections, the weakness of the present plan, especially in so far as it excluded all influence and participation by the member who was unable to attend the Annual meeting, and strongly advocated the delegate system as a necessary safeguard of the interests of the Association, and its general membership. This editorial pointed out that the movement under consideration had two separate features: first, delegates to make the national association representative of the membership as a whole; and second, the coordination of the national association with the several state associations. Those two ideas are not necessarily complemental.[8]

There have been a number of other papers and addresses stressing the need for closer organization and federation of the bar. Joseph McCarthy, of Spokane, tells of the merit of the Washington plan of federalization of county bars, and suggests that a similar plan be worked out between the states and the national association.[9] H. Glenn Kinsley, in an article published in the American Bar Association Journal for May, 1930, made the specific suggestion that there should be a Chamber of Deputies as the official legislative body of the American Bar Association. Under his plan this Chamber would be composed of not less than three delegates from each state, with a proportionally larger representation based upon the number of lawyers in the state who were members of the national association. He also suggested unitary membership in local, state and national associations as a basic need in bringing about coordination of the bar.[10] Dean John H. Wigmore recalled the efforts made from 1913 to 1916 to strengthen the power of the American Bar, by certain internal changes. These were rejected at that time, but one of the recommendations made in the minority report of Dean Wigmore is of present interest namely:

"For the better co-ordination of the membership of the American Bar Association, so as to make it systematically representative of the entire profession in the United States, to insure the proper local professional status of all members, to encourage mutual interest between the American Bar Association and State Associations, and to strengthen the influences of the profession as a whole, establish the following principles for membership: (1) No person shall become a member of the American Bar Association who is not already a member of the State Bar Association (if there is one) this rule not to apply retroactively to persons already members of the American Bar Association. (2) Preserve the principle established at Milwaukee, by merely adding the foregoing to the present qualifications; i. e., an applicant to the American Bar Asso-

6. Charles Evans Hughes, Object, Difficulties, and Methods of Bar Cooperation, 15 A. B. A. Journal, p. 138 (March, 1929).

7. James Grafton Rogers, The Demand for Reorganization in the American Bar, 16 A. B. A. Journal, p. 15.

8. Herbert Harley, The Need for Reorganization in the American Bar, Journal of Amer. Jud. Society, Vol. XIII, p. 142.

9. Joseph McCarthy, Possibilities Toward Federalizing American Bar Association, Journal of Amer. Jud. Society, Vol. XIV, p. 61.

Note: See excerpt from address of James F. Ailshie, The Organization of American Bar Association, 17 A. B. A. Journal, p. 118, wherein it is suggested that it is essential some representative system be worked out to afford lawyers in various parts of the country an equal voice in the determination of measures and issues, regardless of where the Annual meeting may be held.

Also: Proposed Bar Affiliation Plan for Missouri, 17 A. B. A. Journal, p. 210. A Special Committee of the Missouri Bar Association proposed a new state bar constitution, one of the main objects of which was "to encourage the articulation of this Association with the American Bar Association." The plan also contemplates the affiliation of state and local associations, and provides for affiliated members and individual members, the latter not being members of an affiliated local association. A similar trend toward closer relations with the national association is being evidenced in other parts of the country. See editorial "A Significant Development," 17 A. B. A. Journal, p. 309 (May, 1931).

10. H. Glenn Kinsley, Suggestions for Reorganization in the American Bar, 16 A. B. A. Journal, p. 295.

ciation who is already a member of the State Bar Association must still be nominated and elected under the conditions now obtaining. (3) As now, the Local Council from each state would nominate, and as now, the General Council would have to approve. No change at all would here be involved. (4) Lapse of membership in the bar association of a state shall involve cessation of membership in the American Bar Association."[11]

As Dean Wigmore points out, the purpose of that amendment was to link up the state and national association by a purely personal tie, with no official connection by machinery or organization. While that is only collateral to the present movement, it is of interest in that it was one of the inciting causes of the calling by President Root of the Conference of Bar Association Delegates in 1916. The majority at that time opposed any change in internal machinery, but the Executive Committee concurred in the call of the delegates conference with the following resolution:

"Resolved, That the secretary be and is hereby authorized and directed to extend a request on behalf of the Committee to each of the state and local bar associations in the United States to appoint a delegate to attend a conference of such delegates, and representatives of the American Bar Association, to be held at Chicago, Illinois, at the time of the next annual meeting of this Association, with the view of determining what, if any, steps may be expediently taken to bring about closer relationship, official or otherwise, between such other associations and the American Bar Association."

It is not the purpose of this article to go into the history and accomplishments of the Conference of Bar Association Delegates, but suffice it to say that the resulting connection was, and has remained, unofficial.

It is interesting to note that Mr. Root has never swerved from his belief in the efficacy of a common organization. On the occasion of receiving the Association medal at Chicago in 1930, he said:

"I have a great faith in the value and the future of the American Bar Association. I think that to weld together all the separate bars into one body of common understanding and common sympathy and common purpose inspired by the spirit of public service is essential to the preservation of the American system of justice, and to enable the administration of the law to keep pace with the rapid changes of life in our country."[12]

The seed planted so long ago was beginning to bear fruit. True, the harvest is not at hand, but the ground is being cultivated more intensively. The subject began to move from the realm of discussion into that of investigation and report.

Following the address of Chairman Rogers at Memphis, in 1929, the Conference of Bar Association Delegates appointed a special committee to report at the next meeting. Similar committees were appointed by the General Council and by the Executive Committee of the American Bar Association. At the 1930 meeting at Chicago, the Delegates committee, composed of Philip J. Wickser, Chairman, Harry S. Knight, J. Weston Allen, James Grafton Rogers, and D. A. Simmons, reviewed the history of the movement, and made the following recommendation:

"Your committee therefore recommends that it be authorized by the Conference of Bar Association Delegates to join with the committee of the General Council and the committee of the Executive Committee in requesting the Executive Committee to appoint a special committee: (a) To ascertain from state bar associations, state bar association executives and bar leaders in the several states their attitude toward some form of affiliation between the state and American Bar Association so that the American Bar Association may become the means of more accurately expressing the sentiment of the lawyers of the country; (b) to evolve a plan that will affiliate the state bars, in whatever form organized, with the American Bar Association, so that the American Bar Association may become the means of more accurately expressing the sentiments of the lawyers of the country. That the report of the findings and recommendations of this special committee be made to the Executive Committtee, if possible, at its meeting in January, 1931, and that the Executive Committee, upon consideration thereof, formulate and report to the American Bar Association, if possible, at its 1931 meeting, a plan to effectuate the purposes herein suggested."[13]

This report was concurred in by the committee of the General Council, composed of Harry S. Knight, Acting Chairman, John A. Elden, E. H. Cabaniss, John H. Kane, W. H. H. Piatt, and H. Glenn Kinsley, and also by the committee appointed by the Executive Committee, composed of Jefferson P. Chandler, Chairman, Burt W. Henry, John A. Elden, Arthur E. Sutherland, and Walter P. Armstrong.

The Executive Committee accepted the recommendation, and appointed a committee on Coordination of the Bar, with the following membership: Jefferson P. Chandler, Chairman, John A. Elden, Philip J. Wickser, James Grafton Rogers, and Arthur E. Sutherland.

The American Bar Association Journal, in an editorial in the January, 1931, number, pointed out that the problem of the Committee on Coordination of the Bar is not as simple as it might appear. If there were only local and state associations, all constructed on the same pattern, it might not be very difficult to evolve a symmetrical organization. In view of the fact, however, that the local unit may be the bar of a city, town, county, judicial district, congressional district, or some other subdivision of the state, some difficulty becomes apparent. Then, there are Prosecuting Attorneys Associations, Judicial Associations, Junior Bar Associations, Federal Practitioners, and a variety of other organizations which fail to fit into any scheme which has so far been suggested. This diversity of form makes the major problem one of assimilation and affiliation, with no ready-made answer to be found.[14]

A little later, in again discussing this subject, the Journal points out that the past ten years have witnessed unusual activity, the lawyers of the country being occupied with matters of organization as never before. The general aim remains the same as it has been all along: first, a closer affiliation between the American Bar Association and the state groups, thus making the former a more representative body; second, greater efficiency in the procedure at the Annual meeting; and, third, better means of securing the effective cooperation of legislatures and public with the Association's program of action.[15] The first objective is that on which the Committee on Coordination is working, and the Journal states its belief that with the attainment of this object the difficulties presented by the others will be more easily surmounted, since a united bar will, by reason of its very unity, have more in-

11. John H. Wigmore, Organizing the Power of the American Bar, 17 A. B. A. Journal, p. 387.

Note: The appointment and reports of 1913 committee will be found in the Reports of the American Bar Association, Vol. 38 (1913) pp. 69, 172; Vol. 39 (1914) pp. 46, 685; Vol. 40 (1915) pp. 89, 615; Vol. 41 (1916) pp. 93, 94.

12. Reports of the American Bar Association, Vol. 55, p. 133.

13. Reports of the American Bar Association, Vol. 55, p. 25.

14. Our Multitudinous Bar Organization, 17 A. B. A. Journal, p. 31.

15. Organizing the American Bar, 17 A. B. A. Journal, p. 378.

fluence, and, by reason of its size and responsibility, will be compelled to adopt more effective modes of procedure.

The Journal further suggests that, while waiting for the installation of improved machinery of the bar, it is not a bad idea to make the best use possible of the old. It witnesses the instance of the Illinois State Bar Association in making a selection of the member of the General Council more representative by the simple expedient of having the state membership vote in advance on a member who would be recommended to the caucus of that state at the meeting of the American Bar Association. There are possibly other means in which the present machinery may be utilized to a much greater extent than at present, both in coordinating the various associations and making them more representative.[16]

At the 1931 meeting at Atlantic City, Jefferson P. Chandler, Chairman of the Special Committee on Coordination, reported that during the past year the committee had met frequently and had been in contact, by correspondence and otherwise, with many of the bar associations of the country, and with a great many lawyers, in an effort to secure opinions on the subject of "Affiliation," in line with the recommendation under which the committee was created.

He reported at that time that the committee found a great desire on the part of those with whom it had been in contact to have the work of the Association explained and brought to them. No immediate change in the fundamental machinery, either as to the membership or voting, was contemplated; and efforts were being made, and would be continued, to secure the opinion of members of the Association upon the general subject, through every possible channel. No definite recommendations were made at that time.[17]

On January 11, 1932, the Committee reported to the Executive Committee at its Mid-winter meeting at Charleston. After referring to the recommendation previously made, looking toward enlarging the responsibility of the General Council and making its activities more representative, the Committee stated its major problem, and asked for cooperation in its solution, in the following language:

"The underlying question which this Association must decide is whether it desires to retain its present form indefinitely. It now numbers a fifth of the nation's lawyers, its membership being recruited by individual solicitation. Because of the inherent limitations of membership solicitation, it probably can never hope, in its present form, to enroll or speak directly for a majority of the profession. Its will finds expression through annual assemblies which, of late years, have become too large to be deliberative, and, furthermore, are not truly representative of a balanced national opinion. Though the existing machinery is apparently not the most efficient in many ways, it is not certain that either of the two most frequently suggested improvements are immediately feasible: (1) An annual assembly of delegates elected by the members resident in each state, or (2) the establishment of a more or less loose organic affiliation with independent State Associations. Though the latter plan would seem to promise great advance in terms of actual accomplishments, and a better opportunity for the profession collectively to discharge the duty of leadership which it bears to the public, it cannot even be characterized until some indication is forthcoming as to the willingness of the State Associations to cooperate. Your Committee is well aware of the vast divergence in conditions and in degree of associational activity which exists in the several states today. All these factors suggest caution in disposing of the underlying question referred to, yet continued study seems to indicate that it is basic, and must be determined before a truly ultimate objective can be defined. It is hoped that the membership will give it the very serious attention which it merits, and indicate a preference for some basis upon which enlarged activity and participation in the affairs of this Association, on the part of all, may be predicated."[18]

Prior to the last Annual Meeting, the Committee on Coordination submitted to the Executive Committee a list of specific suggestions for consideration, as follows:

1. That the membership in each state nominate members of the General Council according to such procedure as it might itself determine. This would permit continuance of the present system of nomination at the annual meeting or of nomination in advance thereof. If the nominee or his alternate was absent at the annual meeting, the members present from the state were to nominate a new member.
2. That the General Council hold more frequent meetings; one, possibly, just before, or just after the annual meeting, and at least one during the year.
3. That the General Council members be elected for a three-year term.
4. That the Executive Committee more or less regularly refer to the General Council for its consideration, questions affecting the interest and welfare of the Association; and that the General Council, as a body, or through its individual members, contact state bar associations and their executives in the interest of affiliation and cooperation of effort.
5. That some thought be given to the possible future development of legislative power by the General Council, and the general question whether there should be, ultimately, in the Association a House of Delegates similar to the American Medical Association House of Delegates.
6. That the Executive Committee consider the advisability of having a representative, or officer, whose duty would be that of visiting state and local associations to inform them of the purposes, programs and achievements of this Association.
7. That the development of a custom of having a meeting of the vice-president and local Council members at the termination of the annual meeting, with an address by the president, be considered.

These recommendations were referred by the Executive Committee to the General Council, and that body, at Atlantic City, last September, approved most of them in substance, and, in its turn, made certain suggestions of its own to the Executive Committee. Among the most important of these were:

1. That By-Laws be changed to provide that new members of the General Council should take office at the conclusion of the annual meeting.
2. The Executive Committee was requested to consider the advisability of fixing dues at $1.00 per annum for members during the first five years after admission to the bar, provided that could be done without serious financial loss to the association.
3. That the member of the General Council from each states should act with the local council as a committee to further the interests of the American Bar Association in that state, the General Councilman to be chairman of the committee.
4. That the Executive Committee should refer to the Vice-President and Local Council of the several states for consideration, advice and recommendation, questions concerning the general welfare of the Association.

The suggestions of the General Council were referred to the Committee on Coordination of the Bar, which, upon further consideration, again reported to the Executive Committee at its meetings in Charleston and Washington in January and May of this year, respectively. The final conclusion of the Committee on Coordination was that if the Executive Committee so authorized, amendments to the Constitution and By-Laws of the Association should be prepared and submitted to its member-

16. Editorial, Old and New Machinery, 17 A. B. A. Journal, p. 450.

17. Committee on Coordination of Bar Reports Progress, 17 A. B. A. Journal, p. 765 (November, 1931); Reports of American Bar Association, Vol. 56, p. 131.

18. Executive Committee's Mid-Winter Meeting, Report of Committee on Coordination of the Bar, 18 A. B. A. Journal, p. 72 (February, 1932).

ship at the next annual meeting at Washington in October 1932, covering the following proposals:

1. That there be ten Vice-Presidents, one from each United States Judicial Circuit, instead of one from each state, as at present.
2. That the Executive Committee be authorized to appoint Junior Executives to serve at its pleasure.
3. That the General Council consist of one member from each of the forty-eight states, one from the District of Columbia and one at large, the last named to represent all members of the association not residents of such states or district.
4. That the General Council be elected for three years, and take office at the termination of the annual meeting of the Association at which it is elected; and that any member thereof, who fails to attend an annual meeting during his term of office, shall have his successor immediately elected by the members from his state then present.
5. That the Local Councils be changed to "State Councils" and consist of five members, and with the member of the General Council, constitute a committee in each state, whose duty it shall be to further the interests of the Association.
6. That special meetings of the General Council may be called during the year, and that the expenses of the members thereof attending be defrayed from any appropriation the Executive Committee may make for such purpose.[19]

Not in the spirit of criticism, but to focus attention on the main point in issue, we wish to call attention to the fact that these recommendations, —helpful though they may be,—have nothing to do with the matter of coordinating the activities of the several local, state, and national associations. The call which resulted in the organization of the Conference of Bar Association Delegates in 1916 stated that the purpose in view was to bring about a closer relationship, official or otherwise, between the American Bar Association and other associations. In that connection, as heretofore pointed out, it remained unofficial. The obvious purpose of the numerous papers, addresses, and committee reports which have discussed the general problem during the past ten years has been to show the necessity for some official connection between the state associations and the American Bar Association, whether that connection is brought about through affiliation, federation, or the formation of a formal House of Delegates, elected by the lawyers in the several states. The recommendations so far made tend to make the General Council somewhat more representative, and to give it a little more authority within the American Bar Association itself. The idea seems to be to make the General Council an enlarged shadow of the Executive Committee. The recommendations of the General Council simply transfer authority from the Vice-President for the state to the member of the General Council, necessitating the further recommendation of the committee that we have fewer Vice-Presidents, since that office now becomes a badge of honor, with few, if any, duties to perform.

In the April, 1932, Journal, the committee issues a formal statement, enlarging upon the specific recommendations, and leaving it perfectly clear that further study is being made and information sought, looking toward further suggested amendments at a later date.

Since the Committee on Coordination is the representative of the entire American Bar Association in its study, it will not be embarrassed by a suggestion which could not have been made by the original committee of the Conference of Bar Association Delegates without subjecting itself to the criticism that that section was endeavoring to enlarge its own authority.

In view of the entire history of the movement, from its beginning in 1878 to the half-way stage in 1916, and its present rapid crystallization, the obvious thing is to combine the present unofficial functions of the Conference of Bar Association Delegates with those of the General Council. The Conference of Bar Association Delegates is a forum of state and local representatives, to discuss current problems of interest to the profession. It has no legislative authority, and neither has the General Council. The General Council is a nominating caucus, smaller in size, and with the prestige given to it by its political activity. The American Bar Association does not need an enlarged Council, patterned after the Executive Committee; but it needs an official organization, affiliated with the state associations in some form, and on such basis of representation as may be mutually agreed upon.

Coordination—that is the end that is sought; that is the name given to the committee; and that must be the result of its consideration of the problem of unifying the efforts of disconnected associations.

As Chief Justice Hughes said, the thing desired is the concentration of influence; a voice to speak for the entire bar. The individual lawyer, as the individual association, is almost a voice crying in the wilderness. A voice crying in the wilderness may be heard down the ages, but only one ever has. A few against an army fought valiantly at Thermopylae, but the chances of success would not appeal to the tacticians. We have learned that civilization moves in mass formation. Individuals may chart the course, but the game is won or lost by the action of the rank and file. The voice of the individual has been drowned in the roar of the industrial age. Notwithstanding all this, the single sound, weak though it may be, when gathered together with others, scattered from one end of the country to the other, attains a volume which commands instant attention.

We would have it so with the bar. Organization for its own sake is a fetish with some, but not so with those who are now laboring in this field. It is a means to an end, and that end one which is reasonable and feasible, i. e. that by the affiliation of the present dissociated organizations, the national association may speak with authority for the bar on matters national and international, while the state and local associations will perform that function in a more limited field.

19. Coordination of the Bar, Report of the Committee, 18 A. B. A. Journal, p. 161 (March, 1932). Jefferson P. Chandler, Chairman, Province M. Pogue, James H. Corbitt, John A. Elden, and Philip J. Wickser, Secretary, are the present members of the committee.

Government Encroachment on Private Business

(From the New York Times, April 13)

A report on the progressive encroachment by government on the domain of private business was made yesterday to the committee on commerce of the American Bar Association at the first meeting of a three-day session at the Chamber of Commerce of the State of New York.

Former Senator Charles R. Fowler of Minneapolis, who submitted the report, said the agitation against government encroachment dated largely from the World War, when the government assumed many functions which it did not return to private initiative and to which it had since added "in a stupendous manner."

He said only one-tenth of the present Federal budget was to pay for the essential constitutional functions of the legislative, executive and judicial branches of the government and that most of the threatened Federal deficit of more than $2,000,000,000 arose from government losses in business.

Washington Letter

1266 National Press Building.
Washington, D. C., June 10, 1932

ON May 17, 1932, the House Committee on the Judiciary took up for consideration the bill H. R. 10594 (known as the Attorney General's Bill) which provides that for purposes of jurisdiction of the district courts, a corporation organized in one state and carrying on business in another shall be treated as a citizen of such State wherein it carries on business, as respects all suits brought within that state between itself and residents thereof and arising out of the business carried on in such State. The Committee voted against reporting favorably on the bill by a vote of 10 to 6.

At the same meeting, the Committee took up for consideration the Bulwinkle Bill, H. R. 4526, which proposes to increase the jurisdictional amount from $3,000 to $7,500, and voted against reporting favorably on this bill by a vote of 12 to 4.

Congressman La Guardia (of New York) moved to reconsider the vote in each case and these motions were taken up at the meeting of the Committee on May 24, 1932. The motions to reconsider were defeated by a vote of 10 to 6.

On May 18, 1932, Senator Norris, from the Senate Judiciary Committee, submitted a favorable report on S. 3243, to amend section 24 of the Judicial Code, as amended, with respect to the jurisdiction of the District Courts of the United States over suits relating to orders of State administrative boards, (Senate Report No. 701). This bill is known as the Johnson Bill.

"This bill," according to the report, "has for its object the taking away of jurisdiction of Federal district courts to enjoin, suspend, or restrain the enforcement of any order of an administrative board or commission of a State or to enjoin, suspend, or restrain any action in compliance with such order, where the jurisdiction is based solely upon the ground of diversity of citizenship, or where jurisdiction is claimed on an alleged repugnance of such order of such board to the Constitution of the United States, and where such order affects the rates chargeable by a public utility, does not interfere with interstate commerce, and has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy is provided for by the laws of the State."

The report in this case embodies most of the language used in Senate Report No. 530, the report submitted by Senator Norris on April 8th, in reporting favorably on S. 939 to limit the jurisdiction of district courts of the United States in diversity of citizenship cases. When reached on the Senate Calendar June 8th, it was passed over at the request of Senator Reed.

When S. 939 to limit the jurisdiction of district courts of the United States, was reached on the Senate Calendar on June 1st, Senator Copeland of New York requested that it go over. The bill was accordingly passed over.

The Hearing, held May 4, 1932, before the Committee on the Judiciary of the House of Representatives, on H. R. 10594, H. R. 4526 and H. R. 11508, has been printed as Serial 12 under the heading "Limiting Jurisdiction of Federal Courts." This embraces the statements made by Honorable Paul Howland and Mr. Edward Warren Everett, in behalf of the American Bar Association.

Rules of Practice and Procedure in Criminal Cases

On June 1, 1932, the Senate passed S. 4020, to give the Supreme Court of the United States authority to prescribe rules of practice and procedure with respect to proceedings in criminal cases after verdict. The bill reads as follows:

"BE IT ENACTED, etc., That the Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict in criminal cases in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, in the Supreme Courts of the District of Columbia, Hawaii, and Puerto Rico, in the United States Court for China, in the United States Circuit Court of Appeals, and in the Court of Appeals of the District of Columbia.

"Sec. 2. The right of Appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and of preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

"Sec. 3. The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force."

The bill was referred to the House Judiciary Committee June 3.

A similar Bill, H. R. 10639, was referred to a sub-committee of the House Judiciary Committee, of which Mr. Montague is chairman, on April 12, 1932.

Invalidation of Indictments

On June 1, 1932, the Senate also passed S. 933, amending Section 1025 of the Revised Statutes of the United States. This bill provides that an indictment shall not be invalidated if there were present in the grand jury room a clerk or stenographer to assist the District Attorney. The bill reads as follows:

"BE IT ENACTED, etc., That section 1025 of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows:

"Sec. 1025. No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, or by reason of the attendance before the grand jury during the taking of testimony of one or more clerks or stenographers employed in a clerical capacity to assist the district attorney or other counsel for the Government who shall, in that connection, be deemed to be persons acting for and on behalf of the United States in an official capacity and function."

A similar bill, H. R. 10593, was favorably reported to the House on April 22, 1932 (House Report 1097) and is now on the House Calendar.

Circuit Judges

On May 16, 1932, the House passed H. R. 10641 to amend Sec. 122 of the Judicial Code to authorize the circuit judge next in seniority to serve in case of the disability of the senior circuit judge. As passed by the House, the measure provides:

"That Section 122 of the Judicial Code (U. S. C. title 28, sec. 219) be, and the same is hereby, amended to read as follows:

"'Sec. 122. Each circuit court of appeals shall prescribe the form and style of its seal, and the form of writs and other process and procedure as may be conformable to the exercise

of its jurisdiction; and shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law. In case any senior circuit judge is disabled by illness from exercising any power given, or performing any duty imposed by law, such power or duty shall be exercised or performed by the other judges of that circuit in the order of the seniority of their respective commissions.'"

On May 16, 1932, the House of Representatives passed H. R. 10587, to provide for alternate jurors in certain criminal cases. On May 18th the Senate Judiciary Committee referred the bill to a subcommittee composed of Senators Herbert and Ashurst. As passed by the House, the bill provides:

"That whenever, in the opinion of a judge of a court of the United States about to try a defendant against whom has been filed any indictment, the trial is likely to be a protracted one, the court may cause an entry to that effect to be made in the minutes of the court, and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or two additional jurors, in its discretion, to be known as alternate jurors. Such jurors must be drawn from the same source, and in the same manner, and have the same qualifications as the jurors already sworn, and be subject to the same examination and challenges: Provided, That the prosecution shall be entitled to one, and the defendant to two, peremptory challenges to such alternate jurors. Such alternate jurors shall be seated near, with equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected and must attend at all times upon the trial of the cause in company with the other jurors. They shall obey the orders of and be bound by the admonition of the court upon each adjournment of the court; but if the regular jurors are ordered to be kept in custody during the trial of the cause, such alternate jurors shall also be kept in confinement with the other jurors, and except, as hereinafter provided shall be discharged upon the final submission of the case to the jury. If before the final submission of the case, a juror die, or become ill, so as to be unable to perform his duty, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors."

On May 16, 1932, the House of Representatives passed H. R. 10596, respecting the competency of witnesses. On May 18th the Senate Judiciary Committee referred the bill to a subcommittee composed of Senators Waterman, Herbert, and Stephens. As passed by the House the bill provides:

"That the Act entitled 'An Act to make persons charged with crimes and offenses competent witnesses in United States and Territorial courts,' approved March 16, 1878 (U. S. C., title 28, sec. 632), be, and the same is hereby, amended so as to read as follows:

"'In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors in the United States courts, Territorial courts, and courts-martial and courts of inquiry in any state or Territory, including the District of Columbia, the persons so charged shall, at his own request but not otherwise be a competent witness. And his failure to make such request shall not create any presumption against him. In any such trial or proceeding the husband or wife of the accused shall be competent but not compellable to testify for or against the other, but neither shall be competent to testify as to any confidential communication made by one to the other during marriage. And the failure to testify shall not create any presumption against the defendant.'"

Waiver of Prosecution by Indictment

On May 13th, Representative McKeown, from the House Committee on the Judiciary, with an amendment, submitted a favorable report (House Report No. 1300) on S. 2655, providing for waiver of prosecution by indictment in certain criminal proceedings. Eleven members of the Judiciary Committee joined in the Minority views, annexed to the report, and insisted that the bill should not pass.

The bill was passed by the Senate March 2, 1932, and is now pending on the House Calendar.

Review of Recent Supreme Court Decisions

(*Continued from page* 464)

clause does not require a new record for such determination.

In the dissenting opinion the view was also expressed that a Judiciary Article of the Constitution does not require trial *de novo* of the existence of the employer-employee relation.

> Nothing in the Constitution, or in any prior decision of this Court to which attention has been called, lends support to the doctrine that a judicial finding of any fact involved in any civil proceeding to enforce a pecuniary liability may not be made upon evidence introduced before a properly constituted administrative tribunal, or that a determination so made may not be deemed an independent judicial determination. Congress has repeatedly exercised authority to confer upon the tribunals which it creates, be they administrative bodies or courts of limited jurisdiction, the power to receive evidence concerning the facts upon which the exercise of federal power must be predicated, and to determine whether those facts exist. The power of Congress to provide by legislation for liability under certain circumstances subsumes the power to provide for the determination of the existence of those circumstances. It does not depend upon the absolute existence in reality of any fact.
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> The "judicial power" of Article III of the Constitution is the power of the federal government, and not of any inferior tribunal. There is in that Article nothing which requires any controversy to be determined as of first instance in the federal district courts. The jurisdiction of those courts is subject to the control of Congress. Matters which may be placed within their jurisdiction may instead be committed to the state courts. If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process. An accumulation of precedents, already referred to, has established that in civil proceedings involving property rights determination of facts may constitutionally be made otherwise than judicially; and necessarily that evidence as to such facts may be taken outside of a court. I do not conceive that Article III has properly any bearing upon the question presented in this case.

In conclusion, emphasis was placed upon the fact that no good reason was suggested why all the evidence which Benson presented to the Court could not have been presented to the deputy commissioner; nor why he should be allowed to try his case provisionally and then retry it in court in violation of the principle that administrative remedies should be exhausted before resort is made to the courts.

> To permit a contest *de novo* in the district court of an issue tried, or triable, before the deputy commissioner will, I fear, gravely hamper the effective administration of the Act. The prestige of the deputy commissioner will necessary be lessened by the opportunity of relitigating facts in the courts. The number of controverted cases may be largely increased. Persistence in controversy will be encouraged. And since the advantage of prolonged litigation lies with the party able to bear heavy expenses the purpose of the Act will be in part defeated.

The case was argued by Mr. Solicitor General Thacher for the petitioner, Commissioner Crowell, by Mr. Alexis T. Gresham for the petitioner, Knudsen, and by Mr. Harry T. Smith for the respondent.

ECONOMIC ASPECTS OF RATE REGULATION

Public Utilities Are Essentially Business Enterprises, Representing an Investment of Private Capital, and Limiting Returns Within Too Narrow a Range Makes No Allowance for Common Facts of Business Experience—Public Policy and the Fear of Monopoly—"Fair Return on Fair Value" Principle Encounters Many Difficulties—Value of Service as Test of Reasonableness of Rates, Etc.

By C. Elmer Bown
Member of the Pittsburgh, Penn., Bar

THERE are economic factors involved in the problem of public utility rate regulation which have not received much consideration from either the regulating authorities or the parties to the controversy. The theory of rate regulation is that rates shall be fixed so as to yield a return varying from about five to eight per cent on the fair value of the utility property. Limiting returns within such a narrow range makes no allowance for one of the commonest facts of business experience, that returns normally vary widely between different types of business and in the same business from time to time.

Public utility enterprises are essentially business undertakings. With unimportant exceptions the capital invested in them is private capital. They do not exercise governmental functions. Government itself when engaged in these activities is considered as acting in a private or proprietary capacity, and has the same responsibility to the public as the private operator. There are statements in judicial opinions to the effect that utilities are agencies of the state to do that which the state may do itself. The state has the power usually to engage in utility undertakings, but when it permits private capital to take up the work, the capital does not thereby become an agency of the state. Much confusion of thought on this subject is probably due to some of the railroad cases which hold that because a railroad is a public highway, its operation is a governmental function. This reasoning does not distinguish between the establishment and maintenance of the highway and the transportation of passengers and freight over the highway. One is a public function, the other, a business that is merely affected with a public interest. So far as the operation of the railroad is concerned, its public duties have been worked out in accordance with the principles of the law of common carriers and not those of the law governing public highways. The public interest is simply the right to receive adequate service at reasonable rates, as in the case of all the other public utilities.

The public service undertakings differ very much from each other in size and in the nature of their operations. Some are small, with fixed fields of service, and their operations are simple. Others are large, with varied and constantly growing demands for service, and a bewildering complexity in their operations. In some the practice of the art is stationary or develops slowly; in others, such swift progress takes place that the business finds it difficult to keep pace. Some encounter serious losses in hard times; others are very little affected by general business conditions. Some have keen competition to meet, others are almost complete monopolies.

A water company supplying a village of a thousand people provides a basic necessity, has few classes of customers, its volume of business will be fairly constant over a series of years, and the art has developed rather slowly, so that there is not much prospect that expensive new equipment will have to be installed frequently. Such a concern may properly be limited to a return approximating the going rate of interest on the fair value of its property.

A trunk line railroad serves millions of people and provides service of infinite diversity, ranging from the transportation of coal, ore, sand and gravel to the hauling of the millionaire's private car and the carrying of expensive china and blooded livestock. It must construct its tariffs on the principle of charging what the traffic can bear, in order that cheap commodities may move freely, and the more valuable ones contribute to railway income in accordance with the value of the service rendered. A rigid limitation of earnings is hardly compatible with the value of service principle of rate making. There should be some flexibility in the permissible rate of return, otherwise management will not have sufficient discretion in dealing with the exigencies that arise in the operation of the business. A rate of return sufficient to permit the accumulation of a surplus in good times would enable improvements and extensions to be financed in part at least without increasing capital and incurring additional fixed charges. There are constant improvements in the art of railroading. Bigger and improved locomotives haul heavier trains. Heavier rails must be installed, wooden and steel bridges replaced with concrete or masonry, new and larger terminals provided. Money must be found as these needs develop or the public will not receive the service it is entitled to. The most important use of a surplus, however, would be to tide the business over periods of depression. The current losses of business by the railroads are appalling. They are due primarily to the hard times, although they are aggravated considerably by motor vehicle competition. If the railroads had a reserve to draw on in their present plight, they would not need to ask for rate increases. Such a resource would be a powerful aid to recov-

ery. The law at the present time practically forbids the accumulation of surplus since the fact of the surplus is evidence that the rates are too high. It thus discourages in the utilities what is recognized as sound business practice everywhere else.

The electric business is analogous to the railroads in some respects. It supplies a diversified service and there is of necessity a wide range in its rates. It is of comparatively recent origin, the art has developed rapidly and is still developing. Under these circumstances demand for service has constantly increased and probably will continue to do so. New uses of current are at first luxuries or at most conveniences. Rates sufficiently high to yield large profits may be permissible to assist the business to grow.

Fluctuations in earnings are characteristic of practically all business undertakings. The ones that have been conspicuously successful, after passing the experimental stage, have almost invariably had a period of great prosperity in which they have had their greatest growth, sometimes multiplying their capital many times in the course of a few years. If such rates of return are permissible in the competitive field, may there not be some question of the wisdom of the policy which limits the utilities to a mere five or eight per cent? In the nature of things large profits cannot continue forever. There is probably a tendency to diminishing profits as the art progresses toward perfection and the supply to saturation. But to forbid a business from making money when it has the opportunity may turn out to be a very expensive bargain for the public in the end.

Public policy in reference to public utility rate regulation has been controlled by the fear of monopoly and the idea that it is in the public interest to keep rates as low as possible. This is the fundamental reason for ignoring the economic aspects of the subject which have just been mentioned. One wonders whether the fear of monopoly is altogether justified in the case of the utilities. Most of them are natural monopolies, and in the case of those not strictly of this character, the modern policy is to confer the privilege of monopoly in the belief that a regulated monopoly will render more economical and efficient service than competitive undertakings, as in the case of the true natural monopolies. There is some doubt, however, whether these monopolies have the same power to fix extortionate prices as exists in the case of unregulated business. The ordinary method followed by the monopolist to enhance prices is to restrict the supply. The utility is under the duty of rendering adequate service, so that an artificial scarcity can never be created by the utility monopoly. Other things operate to prevent extortion. Competition usually exists. Some form of substituted service is frequently available. Self-interest is also a powerful incentive to reasonable rates. There is a rate below the maximum at which a larger volume of business will be done and a greater profit realized. This is the true value of the service and utility rates left to themselves usually find this level. The real danger of monopoly is that stupid management, not under the spur of competition, may be content with a small volume of business at high rates, and will not seek to develop the business by installing improved methods and lowering prices. The public should pray for progressive, intelligent management, rather than low rates in themselves.

Fair return on fair value has become a fetish. Perhaps the utilities have hesitated to criticise the rule for fear of being charged with claiming unfair returns on unfair values. But fair return surely varies according to circumstances within a wider range than ordinarily permitted.

Properly speaking, the rule is a constitutional limitation. Government may not reduce rates below the point at which they will yield a fair return without violating the due process and equal protection clauses of the Fourteenth Amendment. But a rate may be non-confiscatory and still unreasonable because it does not take account of economic or other factors of reasonableness. A brief study of the origin of the rule and of some of the attempts to apply it will show this to be the case.

The rule was established by the U. S. Supreme Court in the case of *Smyth v. Ames*, decided in 1898. In announcing the rule, the Court said:

> "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

The case was a suit by stockholders of certain railroads to enjoin officials of the State of Nebraska from enforcing rates established pursuant to an act of the legislature passed in 1893. The lower court found as a fact that the rates, if they had been in force, would have yielded little or nothing above operating expenses, and for this reason the statute was in violation of the Fourteenth Amendment to the Federal Constitution as a taking of the stockholders' property without due process of law and also as depriving them of the equal protection of the laws. In this finding the lower court was sustained by the Supreme Court, and the case was decided on this ground. It was, therefore, unnecessary for the court to say anything about the principles of rate-making. Much had been said in argument, however, on this matter, and the court's opinion on the subject was in answer to the contentions of the lawyers. Mr. James C. Carter, then the leader of the American Bar, was counsel for the railroad stockholders. His brief was an able exposition of the theory of railroad rates which has found general acceptance among practical railroad men and students of the subject; that is, that railroad rate tariffs were required by the nature of the business to be constructed on the principle of charging what the traffic would bear, or, in other words, based on the value of the service. Mr. William J. Bryan, for the State of Nebraska, argued that if the rates yielded anything at all above the operating expenses they were not unconstitutional. He urged the court to consider the reproduction value of the railroad property as the basis for calculating its re-

turns, for the reason that the railroads had been built in an era of high prices, with attendant fraud and extravagance, and that their property could be reproduced for less than the original cost.

The opinion in *Smyth v. Ames* must be read in view of the facts of the case and the trend of the argument. It is more an attempt to set Mr. Bryan straight in his views on constitutional law than a discussion of the principles of rate-making. It is a precedent where the issue of confiscation is raised, but it is not the last word on the question of reasonable rates.

In the attempt to apply the principle of fair return on fair value to railroad rates, Congress in 1913 directed the Interstate Commerce Commission to ascertain the value of the roads, and in 1920, by the Transportation Act, made what seemed a logical application of the principle, by requiring the Interstate Commerce Commission to fix a fair rate of return for the roads not to exceed six per cent, and to adjust rates so that the various properties should earn this rate of return. By the same legislation, excess earnings were to be divided between the roads and the government.

It is not overstating the fact to say that the difficulties of fixing rates so as to yield fair return on fair value have been very great, and that there is, as yet, no general agreement on some very important questions which have arisen in the attempts to apply the rule. The difficulties have been both practical and theoretical. The valuation of the railroads has been a stupendous task and the government has expended over one hundred millions already in attempting to do the job. There is an enormous amount of detail with consequent opportunities for disputes on questions of fact. The value in the end, of course, is a question of opinion, with consequent further opportunities for controversy after the other facts in any given case are decided. Perhaps the greatest controversy has been as to the extent to which reproduction value shall be considered in fixing the fair value of utility property. Mr. Bryan urged the reproduction theory on the Supreme Court because it was then lower than the original cost of the property, and he argued that the people should have the benefit of the fall in prices. Since that time the utilities have urged it on the courts for exactly the opposite reason. If the value of the utility property is the basis for fixing its rates, of course, reproduction value is always important. It does not seem to me, however, that it will be possible to base utility rates on reproduction value in an era of falling prices. The results to the utilities would be too disastrous. In any event, the extent to which reproduction value shall figure in the rate base must differ with every property and in each property from time to time, so that from a practical standpoint the standard leaves much to be desired.

Valuation, of course, is only a means to an end. When a valuation has been made, the problem is to adjust utility income to the valuation or rate base. In the case of the railroads, the Interstate Commerce Commission has found the task of fixing the rates so as to yield the legal return, too big and complicated and it has not attempted the general revision of rates contemplated by the Transportation Act of 1920.

Questions of fair return have not provoked as much controversy as those relating to property value. There has been a good deal of discussion as to the reasonable rate in view of the risks of the enterprise and of the necessity of attracting new capital. In the case of the utilities other than the railroads there has been pretty general agreement among regulating authorities that not less than seven nor more than eight per cent is fair. There is a general recognition of the necessity of fixing a rate of return that will attract new capital to the utilities, but no attention seems to have been paid to the idea that it might be a good thing to provide a considerable proportion of the new capital out of the earnings of these properties, so that they might move under their own steam, and not with motive power provided from the outside. This is the natural way for a business to grow, and there may be some relation between the capital that should be provided in this way and that which may properly be obtained from other sources.

The Pennsylvania Railroad, American Telegraph & Telephone Company, the Commonwealth Edison Company, and similar undertakings, resemble the Ford Motor Company, United States Steel Corporation, and enterprises of this character, more closely than they do the small town public utilities. They have the same need for capital and managing ability, and above all it is in the public interest that they shall continually increase their fields of service. The prosperity of the communities they serve and of their employees, to say nothing of the interests of their security holders, depend in a large degree on the success of these enterprises. One cannot help wondering what the result would have been if Mr. Ford had been limited to a return of seven percent, yet the automobile is as much a necessity in modern life as electric current. It might occur to a generation that has seen the rise of the motor industry, and that reads of the salaries paid to movie stars, that there is a possible question whether seven or eight percent is a fair return to a utility under all circumstances.

It is unfortunate that the emphasis in regulation has been on property values and profits. The burden on both the utilities and the public imposed by the controversies over these questions has been heavy. Money and energy have been expended which might better have gone into the business or been saved to the tax-payers or stockholders. Worst of all, the course of the controversy has distracted attention from the real merits of the case. It is in the public interest to foster the growth of the utilities. In so far as low rates hamper or retard this growth, they may turn out to be a very unwise policy for the public. It is possible in this case, as in the ordinary affairs of life, to buy something too cheaply.

Permission to the utilities to build up their capital and surplus out of earnings would remove, or at least lessen, the temptation they have been under of issuing securities to enhance property values. Stock dividends paid out of accumulated earnings are the result of natural growth and might not be at all incompatible with the public interest. The opportunity to develop the business in this way would also tend to lessen the degree of banking control of the utilities. Whether or not this is so harmful as some people profess to believe, it

probably would be a good thing for the utilities to develop a measure of self-reliance in this respect.

There is an alternative to the rule of fair return on fair value as applied by regulating authorities. Utilities and public alike have been so engrossed in problems of valuation that very little has been said about the matter. There is quite eminent authority, however, to the effect that property values and rates of return may have little to do with questions of reasonable rates. In the case of *Canada Southern Railway Company v. International Bridge Company*, decided by the House of Lords in 1883 and cited in the case of *Cotting v. Kansas City Stock Yards Company*, decided by the United States Supreme Court in 1901, the court held that the test of the reasonableness of the rate was the value of the service to the customer, in the following language:

"It certainly appears to their lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence that the charge is unreasonable, with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything which is to be regarded as material to the person against whom the charge is made. One of their lordships asked counsel at the bar to point out which of these charges were unreasonable. It was not found possible to do so. In point of fact, every one of them seems to be, when examined with reference to the service rendered and the benefit to the person so receiving that service, perfectly unexceptionable, according to any standard of reasonableness which can be suggested. That being so, it seems to their lordships that it would be a very extraordinary thing indeed, unless the legislature had expressly said so, to hold that the persons using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and, after manipulating the accounts in their own way, to ask a court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are still subject to the risks which from natural and other causes every such undertaking is subject to, and who may possibly, as in the case alluded to by the learned judge in the court below, the case of the Tay Bridge, have the whole thing swept away in a moment, are to be regarded as making unreasonable charges, not because it is otherwise than fair for the railway company using the bridge to pay those charges, but because the bridge company gets a dividend which is alleged to amount, at the utmost, to 15 percent. Their lordships can hardly characterize that argument as anything less than preposterous."

Their Lordships were not alone in the views here expressed. Men of unquestioned eminence as thinkers and economists, probably on the whole the ablest minds that have studied the subject, have reached the same conclusions. Albert Fink and Charles Francis Adams, writing over half a century ago, showed that railroad rate tariffs necessarily were constructed on the value of service principle. Sir William Acworth, writing of the English railway practice, came to the same conclusion. These views were ably presented by Mr. Carter in his brief in *Smyth v. Ames*. More recently, Professor Ripley has written to the same effect, although he believes that the principle is of more limited application, and seems to think that it must be modified to prevent some rates from being excessive. President Hadley, testifying before the Commission on the revision of the New York Public Service Company Law, expressed the opinion that the principle was applicable to the rates of all the utilities, and this view is also held by Professor Cabot of the Harvard School of Business Administration in an article published in the issue of Public Utilities Fortnightly June 11, 1931.

The duty of the utility to serve at a reasonable rate is as old as the common law. The common carrier and the innkeeper are the classic instances. Rate questions at common law seem to have arisen only over charges for particular services, and there was no general rule for ascertaining the reasonableness of such charges. Probably the method was simply to compare the rates in question with those charged for similar services elsewhere. The utility as we know it is essentially a modern institution, a product of the machine age. For this reason, questions relating to the reasonableness of the charges of the utilities in the aggregate have only recently become important, and *Smyth v. Ames* is the first attempt of the courts to deal with the question. The rule of fair return on fair value is artificial in its origin and has not been thoroughly tested by time. The difficulties in its application have been so great as to suggest the question whether it is correct in principle. The value of service rule is sound economically and has manifest practical advantages. Relief from the burden of protracted and expensive litigation over property values might alone warrant its trial.

It seems to me that the questions are, after all, economic and not legal. At least there cannot be effective regulation without understanding and applying the economic principles which govern the subject. There is no inherent right in the public to pay less than a service is worth. Concede that government may fix rates so that they will only yield a certain return, it still does not follow that it is sound public policy to do so. Rates should be fixed with a view to encouraging the growth of the business through developing the art and expanding fields of service. A utility is not different in this respect from any other business employing private capital. The highest opportunity for constructive statesmanship does not lie in the direction of cutting down the profits of the utilities, but in fostering intelligent and progressive administration of their affairs with a view to expanding their fields of service to the utmost. If this ideal could be realized the rates for service of this character could not help but be reasonable.

The Paramount Problems of Today

The relative importance of certain problems of the nation has shifted considerably during the past few years, according to a preferential vote of the National Council of the National Economic League, recently taken. A few years ago the administration of justice was at the head of the list. Today the first ten "paramount problems of the present economic depression" are listed as follows: Economy and Efficiency in Government, National, State and City; Taxation; Reparations and International Debts; Banks, Banking, Credit, Finance; Reduction and Limitation of Armaments, Disarmament; Tariffs; Restoration of Confidence; Administration of Justice; International Tariff Conference; Unemployment, Unemployment Relief.

DEPARTMENT OF CURRENT LEGISLATION

The Federal Anti-Injunction Act

By J. P. Chamberlain

THE long sustained effort of the labor unions to persuade Congress to proceed further along the line laid down by the Clayton Act in limiting the power of the United States courts to issue injunctions in labor disputes, was crowned with success by the enactment of Public No. 65 of the 72nd Congress. This act is substantially the bill introduced at the request of the labor unions. The development of the Clayton Act under the decisions of the courts has been unsatisfactory to the unions and this act is an effort to deal with the situation. As in the case of the Clayton Act, the language of the new law is not always clear. The Attorney-General, in recommending that the President approve the bill, reports that: "In a number of respects it is not as clear as it might be and its interpretation may involve differences of opinion."[1] Where this is so, the words of the statute must, according to the rulings of the courts, be interpreted in the light of the purpose which it was intended to effect, and to find what that purpose was the court will examine the reports of the Committee, the statements of the Member in charge of the bill on the floor and, where necessary, the testimony given at the hearings. The great importance of a properly drafted committee report, prepared **not** only for the purpose of informing Congress of the intent of the bill, but also informing the profession and the courts, will be very apparent to any member of the Bar who reads the very complicated language of the statute and endeavors to apply it to particular instances.

The use of extraneous aids to ascertain the meaning of a doubtful clause in a statute was well described by Justice Brewer in a case in which was in question the extent of the contract labor law:[2]

> "Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. . . It appears, also, from the petitions, and in the testimony presented before the committee of Congress, that it was this cheap unskilled labor which was making the trouble. . ."

Justice Taft, in passing on the Packers and Stockyards Act, referred to "the data before the Committee" and the hearings of the House Committee, and said:[3]

> "It is helpful for us in interpreting the effect and scope of the act, in order to determine its validity, to know the conditions under which Congress acted."

The Attorney-General appears to apply the same rule when he closes his report by saying of the bill, "considering its legislative history, I recommend that it receive your approval."

The act lays down as a general rule that no "restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act." This public policy is that "it is necessary that he [a worker] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted."

In addition to this general rule for the guidance of the courts in granting injunctions, the law goes into detail both in laying down the acts which cannot be enjoined, in the procedure in the application for an injunction, and in the method of trying contempts.

The restriction on injunctions is limited to cases involving or growing out of a "labor dispute." This language is much wider than the description in §20 of the Clayton Act, which applied to injunctions "involving, or growing out of, a dispute concerning terms or conditions of employment." The new act defines a labor dispute to include: "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." The Clayton Act is limited to cases between an employer and employee, or between employers and employees, or between employees, or between persons employed and persons seeking employment. The new law goes much further. It applies to cases "involving or growing out of a labor dispute" and defines these cases in §13:

> "(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers and associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as hereinafter de-

1. United States Daily, March 24, 1932, pp. 1, 3.

2. Church of Holy Trinity v. United States, 143 U. S. 457, at 463, 36 L. Ed. 226, 229 (1891).

3. Stafford v. Wallace, 258 U. S. 495, at 513, 66 L. Ed. 735, at 740 (1921). See also New York Central R. R. v. Winfield, 244 U. S. 147, 150, 61 L. Ed. 1045, 1048 (1916); O'Hara v. Luckenbach S. S. Co., 269 U. S. 364, 368-9, 70 L. Ed. 313, 315 (1925).

fined) of 'persons participating or interested' therein (as hereinafter defined).

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee"

This language will go very far in covering any classes of persons, including a dispute between two unions or an injunction sought by a union against an employer. A further limitation on the equity power of the court is contained in §8 which forbids the issue of a restraining order or the granting of injunctive relief:

"Sec. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Of course, it would remain within the discretion of a court of equity to determine whether or not the complainant had or had not failed to make every reasonable effort to settle the dispute.

The definition of labor disputes was intended to meet the decision in the Duplex case[4] that the Clayton Act did not apply to sympathetic strikes, as is made clear by the mention of the Duplex case in the Report. The language of the act, as interpreted by the Report, would clearly cover "other members of the union not standing in the proximate relation of employer and employee." Thus if a dispute arises between members of a union and an employer, other members of the same national or international union anywhere in the country, may not be enjoined from acting against their own employer, with whom they have no quarrel, to further the cause of those members who are directly engaged in a labor dispute. Whether members of other unions would get the benefits of the act if they began a sympathetic strike is not so clear, especially in view of the language of the Report.

Another decision which was intended to be modified by the statute was the American Steel Foundries Co. v. Tri-City Central Trades Council[5] in which the Supreme Court laid down a rule limiting the number of pickets which could be stationed about the mills of the complainant. The applicable section lists among the acts which shall not be restrained, "giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence." The Committee in its Report declares that this section "specifically restricts the court" from enjoining one giving publicity to the facts "unless the acts are accompanied by fraud or violence." Justice Taft, in the *Tri-City case*, writing of large groups of strikers, said,

"The number of the pickets in the groups constituted intimidation. The name 'picket' indicated a militant purpose inconsistent with peaceful persuasion."

He therefore limited the number of pickets allowed, to do away with "the necessary element of intimidation in the presence of groups of pickets." The question may be raised whether the provision will apply in a case in which intimidation may be a factor and if it does apply when fraud and violence are presented, or what degree of fraud or violence must be present to take the case out of the statute. It will be for the courts in particular cases to prick out the line which divides the sheep from the goats.

The third rule sought to be modified was that laid down in the Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association,[6] allowing an injunction under the anti-trust law. In that case there was a strike against the company at its quarries and the members of the union in other parts of the country refused to work on the "unfair" stone of the complainant. The Supreme Court said that such refusal in concert was a combination in restraint of trade which could be enjoined as an unlawful combination or conspiracy because of the doing in concert of acts for which an injunction could not issue if done by individuals. The new law seeks to change this rule by enacting:

"Sec. 5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated. . ."

as non-enjoinable.

Section 3 of the Act contains the essentials of a bill which has been pushed in many states by labor. It has been passed in Arizona, Ohio, Colorado, Oregon and Wisconsin.[7]

Section 3 is directed against the "yellow dog" contracts, that is, contracts by which an employee agrees that he is not a member of the union and that he will not join the union during his employment. He is free to join the union at any time, but his agreement is that if he decides to do so, he will quit his employment. Injunctions to prevent union organizers from endeavoring to have these contracts breached have been issued in several cases.[8] The act declares that such contracts are unenforcible in any court of the United States and that they "shall not afford any basis for the granting of legal or equitable relief by any such court." This applies both to agreements by employees not to join labor organizations and by employers not to join employer organizations. There is a lively contest over the validity of such contracts. In New York the highest court has twice doubted their validity; once in a case in which it was not necessary for the decision,[9] but again in a case in which the court flatly said that such an agreement though signed by an employee with knowledge of what it meant, was not a contract but merely a promise based on no consideration and therefore unenforcible.[10] The contracts, however, have been held

4. Duplex Printing Co. v. Deering, 254 U. S. 443, 65 L. Ed. 349 (1920).
5. 257 U. S. 184, 66 L. Ed. 189 (1921).
6. 274 U. S. 37, 71 L. Ed. 916 (1926).
7. Arizona Laws 1931, ch. 19; Colorado Laws 1931, ch. 112; Ohio, Page's Ann. Code 1931, §6241-1; Oregon Laws 1931, ch. 247; Wisconsin Statutes 1931, §103.46, and §268.19.
8. Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. Ed. 260 (1917); Kraemer Hosiery Co. v. Am. Fed. of Full Fashioned Hosiery Workers, 157 Atl. 588 (Sup. Ct. of Penna. 1931). See "Yellow Dog" Contracts, Edwin E. Witte, 6 Wis. L. Rev. 21 (1930).
9. Interborough Rapid Transit Co. v. Lavin, 247 N. Y. 65 (1928).
10. Exchange Bakery, Inc. v. Rifkin, 245 N. Y. 260 (1927).

valid by the United States Supreme Court in the famous *Hitchman case*,[11] and only recently the Supreme Court of Pennsylvania[12] sustained an injunction to prevent a union from inducing the employees to breach their contracts. The court held the contract to be valid though one of the judges concurring thought there was no consideration,[13] and in the dissenting opinion the contract was thought to be a nullity, the employee having no freedom and there being no consideration.[14] It will evidently make a great difference in the judicial reaction to this section if the court believes the contract is itself invalid so the employer has no right to protect.

The Supreme Court of Massachusetts, in advisory opinions,[15] has twice held that a statute of this sort would be an interference with liberty of contract on the part of employers and employees and therefore invalid, basing its decision on the *Hitchman, Adair* and *Coppage cases*.[16] The statutes held bad in the *Adair* and *Coppage Cases* approached the difficulty from another point of view since they made it a misdemeanor for the employer to insist on such contracts, holding that it was an interference with freedom of contract. With the issue thus flatly presented, it is certain that the Supreme Court of the United States will have to consider again whether even if the making of such contracts cannot constitute a misdemeanor, the Congress may forbid the use of the equity power to protect it by injunction.

The procedure in applications for injunctions is tightened. The court must make findings of fact after hearing witnesses in open court, that unlawful acts have been threatened and will be committed or continued unless restrained, that as to each item of relief granted, greater injury will be inflicted on the complainant by denying than on defendants by granting it; "That the complainant has no adequate remedy at law; and that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection." A temporary restraining order for no more than five days may issue without notice if the court believes that it is necessary to prevent "a substantial and irreparable injury to complainant's property." Such an order can be issued only on a bond and becomes void at the expiration of five days. Thus the possibility of an injunction issued at the request of one party and resulting in a surprise is rendered very unlikely.

The Clayton Act substituted jury trial at the request of the defendant for the summary jurisdiction of the court to punish for breaches of an injunction where the act which constitutes the breach would be a criminal offense under the laws of the United States or of the state in which the act is committed. Sec. 11 of the new statute gives the person accused of a contempt "the right to a speedy and public trial by an impartial jury of the state or district wherein the contempt shall have been committed." This right, as in the Clayton Act, does not apply "to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice." The Supreme Court sustained this provision of the Clayton Act against the contention that it materially interfered with the inherent power of the court to punish for contempt. The court, however, observed that the statute dealt only with crime "in the ordinary sense," and that it did not reach "cases of failure or refusal to comply affirmatively with the decree—that is, to do something which the decree commands," and added that "if the reach of the statute had extended to the cases which are excluded a different and more serious question would arise."[17] The court adverts to the fact that "in criminal contempts, as in criminal cases, the presumption of innocence obtains." The language of Sec. 11 would include these other cases so that it is evident that the court will have to struggle again with an extension of the doctrine in the *Michaelson Case.*

It is common experience that statutes like this anti-injunction law will be widely adopted by the States as it is quite usual for a federal statutory model to be used in the states in a situation in which there is a strong and active body of people moving for reform. If this is so, many cases involving the application of such statutes will come up to the Supreme Court under the 14th Amendment. The decisions of the Supreme Court, therefore, in interpreting the new law will in all probability have an importance in the state as well as in the federal jurisdiction, as laying down a uniform rule over the whole country.

11. *Supra*, note 8.
12. Kraemer Hosiery Co. v. Am. Fed. of Full Fashioned Hosiery Workers, *supra*. note 8.
13. *Op. cit.* at p. 591.
14. *Op. cit.* at p. 597.
15. Opinion of the Justices, 271 Mass. 598 (1930); Opinion of the Justices, Mass. Advance Sheets, p. 1151, May 11, 1931.
16. Hitchman Coal & Coke Co. v. Mitchell, *supra*, note 8; Adair v. United States, 208 U. S. 161, 52 L. Ed. 436 (1907); Coppage v. Kansas, 236 U. S. 1, 59 L. Ed. 441 (1914).
17. Michaelson v. United States, 266 U. S. 42, 66, 69 L. Ed. 162, 167 (1924).

The Federal Jurisdiction and Recent Attacks Upon It

(*Continued from page* 439)

cipal place of business; not to deny the federal jurisdiction to all foreign corporations simply because they are doing business within the state. There is no sense in burning down your house to get rid of the rats.

I leave the problem with you. It is peculiarly a problem to which the lawyers of the United States should address themselves. I have said that the judiciary is the keystone of the arch of constitutional government. Let me add that of all the branches of government it is the most helpless to defend itself from attack. It has not the sword of the executive nor the purse of the legislative. Its only strength is in the confidence and support of the people; and for that support it must depend upon the leadership and intelligence of the bar. I respectfully submit that in this assault upon its jurisdiction the federal judiciary is entitled to your support, not that the judges themselves are to be supported, but that upon the maintenance of the federal jurisdiction depends the future of constitutional government, and that upon the future of constitutional government depends the future of the Republic and in a very real sense the future of the liberties of mankind.

LAW SCHOOLS AND LAWYERS

Conditions in the Profession As Indicated by Unique Record Kept by Justice McCook of the New York Supreme Court—Part-Time Schools and Their Responsibility for the Numbers Who Are Admitted to the Bar with Inadequate Preparation — Practicability of Distinguishing between Fit and Unfit Applicants for Admission to Law Schools—Content of Legal Education Must Be Revised to Arouse a Higher Idealism in Future Members of the Bar*

By Young B. Smith
Dean of the Law School of Columbia University

LAST June I had the pleasure of addressing the members of this Association at the annual meeting in Atlantic City. On that occasion I spoke about law reform.[1] Today I shall talk about law schools and lawyers. Justice is so dependent upon the efficiency and the honesty of those who administer it, that changes in legal rules and in methods of administration will have little effect unless membership in the bar is restricted to men of high ideals, capacity and integrity.

The protests of bar associations, civic organizations and the daily press, against the presence at the bar of large numbers of men who are unfitted either in knowledge or in character to assume the responsibilities incident to membership in the profession; the recent disclosures of incompetency or misconduct on the part of judges as well as of lawyers in some of our larger cities, and the indifference of the bar as a whole towards such matters, make it abundantly clear that conditions in the profession are not as they should be.

Last year, New York University School of Law published a monograph by William M. Wherry, of the New York bar, on a most interesting study which was made of the organization and of the jury trial in the Supreme Court of New York county. This monograph was based partly on data gathered by Mr. Wherry, partly upon the judicial statistics of the work of the Supreme Court in the First Judicial Department, published by that court each year, and partly upon certain data collected by Justice Philip J. McCook, of the New York Supreme Court.

It appears that beginning in 1926 and continuing through 1927, Justice McCook, who had been assigned to sit only in the Trial Term during this period, made very elaborate notes regarding each case which came before him. During 1927, 604 cases were disposed of before Justice McCook, of which 268 reached Trial Term. While these cases represent only a small proportion of the 16,700 law cases actually disposed of by the Supreme Court during 1927, they were taken at random, without any attempt at special selection, and were quite representative. Justice McCook's notes on each case were kept pursuant to an outline of items with ten heads and thirty sub-heads prepared in collaboration with Mr. Wherry and other lawyers.

Among the notations made by Justice McCook, he rated the lawyers who appeared in each case as to their skill, their fairness, and their ethics. The distinction between fairness and ethics was defined by the Justice as follows:

"By ethics I mean a professional standard based perhaps in part on morals; by fairness, what might be called a sportsmanlike attitude. For instance, a lawyer who is fair would not insist on technical proof of an indisputable fact, although it would not be unethical for him to do so. An ethical lawyer will not use witnesses that he knows are committing perjury. Some men are fair by nature; others cultivate an appearance of it for its effect on court and jury. In classifying the lawyers, I did not, as a rule, seek to penetrate behind their attitude in court."

In the cases tried before this Justice, the ratings of the lawyers were as follows:

As to Skill:

103 were standard	34½%
81 over standard	27%
104 below standard	38%

As to Fairness:

150 were standard	46%
81 over standard	24⅔%
95 below standard	29%

As to Ethics:

210 were standard	80½%
11 highest standard	4⅙%
*40 below standard	15⅛%

*Of which 9 were marked as having no ethical sense.

In a discussion of these figures in 1928 before the Bar Association of the City of New York, Justice McCook stated that he set the standards as to skill, fairness and ethics, not at what he deemed ideal but at what seemed fair according to general acceptance by properly educated lawyers.

Mr. Wherry, in commenting upon Justice McCook's grading of the 300 lawyers who appeared before him, remarks in his book:

"It will thus be seen that out of the total lawyers, there were more lawyers below the standard in both fairness and skill than above, and this is very marked in relation to skill.

"As to ethics, the same thing is true. Fifteen and one-third per cent were below the accepted standard, as against four and one-sixth per cent above, and of these fifteen and one-third per cent there were more than one-fourth who had no ethical sense.

"If these ratios hold true for the entire Bar, there are so many unskilled and unethical members that drastic reform is needed."

There are over 20,000 lawyers in New York City. If Justice McCook's percentages are typical,

*Address delivered at the Mid-Winter Meeting of the New Jersey State Bar Association, at Newark, January 30, 1932.

1. Dean Smith's earlier address on Law Reform was published in the January, 1932, number of the New York State Bar Association Bulletin.

more than 7,000 of them are lacking in skill, approximately 5,000 of them are unfair, and at least 3,000 of them are unethical.

The National Conference of Bar Examiners have estimated that in 1930 there were at least 160,000 lawyers in the United States as compared with 122,000 in 1920 and 114,000 in 1910, making an increase since 1910 of over 40%. You will observe that of the total increase of 46,000 lawyers since 1910, 38,000 or 82% has occurred since 1920.[2] In 1930 about 20,000 applicants were examined, of which number about 10,000 were admitted. In 1931 there were 2,865 applicants admitted to the bar in the State of New York alone, of which number 2,540 were admitted in the First and Second Judicial Departments. Such evidence as is available indicates that there are about twice as many new lawyers admitted annually as are needed.

According to the Review of Legal Education in the United States by The Carnegie Foundation, the number of law schools in 1930 was 180 as compared with 146 in 1920 and 124 in 1910 making an increase since 1910 of 56 schools or 45%. The number of law students in 1930 was 43,989 as compared with 24,503 in 1920 and 19,498 in 1910. You will notice that the number of law students has increased 125% during the twenty year period and of the total increase of 24,491 since 1910, 19,486 or 79% has occurred since 1920. In this connection it should be observed that the number of students attending full-time schools increased from 8,438 in 1910 to 14,956 in 1930, an increase of 77%, whereas the number of students attending part-time and so-called mixed schools increased from 6,750 in 1910 to 28,392 in 1930, an increase of 420%.

These figures indicate that by far the greater portion of the mass of humanity which has found its way into the bar since 1910, particularly since 1920, has come from the part-time and mixed law schools. For example, during the academic year 1929-30, there were registered in the five exclusively full-time schools in New York State a total of 1,255 students, whereas the total enrollment in the five part-time and mixed schools was 6,905, of which 3,928 attended the evening sessions.

It is not my purpose to launch an attack upon the part-time law school merely because it is part-time. The main objection to the part-time law schools is that they are pouring literally thousands of men into the bar who are inadequately prepared to assume the responsibilities of a lawyer.

If less than three years of law study in a full-time school is regarded as insufficient preparation for admission to the bar, and this is the case in nineteen states including New York and New Jersey, it is obvious that three years of study in a part-time school is inadequate preparation. Yet in eight of the nineteen states, including New York and New Jersey, no distinction is made between the full-time and the part-time schools for purposes of admission.

While it may be true that the student in the part-time school may attend three-fourths or four-fifths as many lectures during three years as the student in the full-time school, it does not follow that the student in the part-time school has devoted three-fourths or four-fifths as much time to law study as the student in the full-time school. For example, most of the students in a part-time school are compelled to devote from five to eight hours per day to outside work. Adding the two hours during which they attend lectures, leaves them very little time in which to read or to think about their law studies. On the other hand, most of the students who attend a full-time school are engaged in no work other than the study of law. In addition to attending lectures, they can and in the better grade schools actually do devote from six to eight hours per day to preparation. Consequently, the vast majority of students in a full-time school during the course of three years devote two or three times as many hours to law study as it is possible for the part-time student to give during the same number of years. Thus, the present three year requirement, which applies in New York and New Jersey to students in both full-time and part-time schools, permits large numbers of men coming from the part-time schools to be admitted to the bar who, in reality, have had not more than the equivalent of one to one and a half years of study in a full-time school.

Furthermore, it should be noted that normally the admission requirements of full-time schools are higher than those of the part-time and mixed schools. In 1929-30, 77 of the 80 full-time law schools in the United States required two years or more of college work for admission, whereas only 45 of the 100 part-time and mixed schools required as much as two years of college work, 36 required only one year and 19 required none. Because of these facts, and because of the greater amount of time which the students in the full-time school are able to devote to their law studies, it is possible for the full-time schools to maintain more exacting educational standards than is possible in the part-time schools.

All that I have said has been recognized by the American Bar Association. In 1921 that Association recommended to the several states that the minimum requirements for admission to the bar should be two years of college work followed by three years of full-time law study or "a longer course equivalent in the number of working hours" of part-time study.

Although this recommendation was made more than ten years ago, in 1930 there were 14 states which had adopted the two-year college requirement and 11 states had fixed four years of study in a part-time school as the equivalent of three years of study in a full-time school.

Last year, petitions were submitted to the Court of Appeals in New York by the Association of the Bar of the City of New York and the New York County Lawyers Association praying that the required period of study in part-time schools be increased to four years. This proposal was approved not only by the full-time schools, but also by four of the five schools in the state which conducted evening classes. It was actively opposed only by the St. John's College School of Law, in Brooklyn. The principal objection urged was that in the full-time schools there were some students who devoted only part time to their law studies, therefore it was claimed that a requirement of four years of study in a part-time school, when only three were required of students in a full-time

2. These figures do not represent the total number of new lawyers admitted, but the net increase in the number of lawyers taking into account deaths as well as new admissions.

school, would be a discrimination in favor of the part-time student attending the full-time school. The argument appears plausible, but its fallacy lies in the assumption that the preparation of the part-time student who graduates from the full-time school is no greater than that of the student who graduates from the part-time school. This overlooks a very important difference, namely, that the part-time student who graduates from the full-time school must comply with educational standards determined by the capacities of a student body, most of whom are devoting substantially their full working time to law study, whereas the graduate of a part-time school must comply with educational standards determined by the capacities of a student body, the vast majority of whom are devoting only a few hours a day to law study and this, mostly at night, after the exhaustion of a day's work at some other occupation.

Unfortunately, the Court of Appeals was not satisfied with the definitions of full-time and part-time schools which were proposed. In denying the applications to amend the rules, the Court in its opinion declared that it felt constrained to do so at that time, but that "the proposed change, even if ultimately accepted in principle, must be at least postponed until a more satisfactory definition can be worked out whereby to distinguish between full-time and part-time courses" . . . and the opinion added in conclusion that "the interesting data submitted would be the subject of reflection and with the cooperation of the bar and of the faculties of the law schools may lead to action in the future."

The proposal that students in part-time schools should study for a longer period than students in full-time schools, is not a proposal that the students in the part-time schools should be subjected to more exacting standards than the students in full-time schools, but that they should be required to comply with the same standards imposed upon the students in full-time schools before they are granted admission to the bar. In view of the large number of students who are at present gaining admission to the profession through the part-time schools, this change in the present admission requirements of most of the states is prerequisite to any substantial decrease in the excessive number of incompetents who are annually admitted to the bar.

While prolonging the period of study required of students attending the part-time schools will tend to raise the level of competency of candidates for admission to the bar, this alone will not solve the problem with which the profession is faced. The kind and quality of work which a law school can do are conditioned by the capacities of the students as well as by the abilities of the Faculty. Substantial improvement in legal education is not likely to be realized if large numbers of men are admitted to the schools who are incapable of complying with the standards sought. The completion of two years of college work is not a sufficient guarantee of capacity to keep out large numbers of the unfit. This is shown by the fact that in the better grade full-time schools which admit only students with a college degree, or students who have completed two or three years of college work, a very large proportion of those admitted are either excluded from the school or from graduation because of unsatisfactory work. The admission of large numbers of students who are unable to do good work either results in lowering the standards of the school, or else in an unnecessary waste of time and money on the part of the incapable students.

In recent years, a number of schools have endeavored to select their students, thus refusing admission to applicants lacking in capacity or who are of doubtful character. But the efforts of these schools will have little effect upon the bar so long as the rejected applicants are eligible to enter other schools. I am not so naive as even to suggest at this time that all law schools should maintain the same standards of admission, but it would be a great step forward if all the schools in a particular locality or state would agree upon some minimum standard of fitness, would investigate the qualifications of applicants, and would refuse admission to all applicants who did not measure up to such standard.[3]

Columbia Law School has for four years not only examined each applicant as to his intellectual capacity, but has also made careful inquiry into his past history in order to discover facts which would raise doubts as to his moral fitness for admission to the bar. Thus during the current academic year there were 504 applicants for admission to the first year class; 409 took the required entrance examination, 129 were definitely rejected, and 280 were approved for admission. In view of the doubts which have been expressed concerning the practicability of distinguishing between the fit and the unfit in advance of admission to law school, I am now having printed for distribution a summary of our experience in selecting students. The results shown in this summary indicate that it is possible, if all law schools would make the effort, to stop at the threshold a large proportion of the incompetents who are at present passing through the schools into the bar.

The insistence of bar associations that the law schools should place greater emphasis upon the study of legal ethics is, perhaps, justified. But the teaching of legal ethics to law classes comprising large numbers of men who are obviously unworthy in knowledge or in character of membership in the profession will have little effect upon the conditions at the bar which are arousing the indignation of the public and of the better element in the profession. In this connection, it should not be overlooked that many of the schools which have been the principal offenders in admitting and graduating students unworthy of membership in the profession, have given courses on legal ethics. However, the responsibility of the law schools does not cease with the selection of its students. To a large extent the disgraceful exhibitions of professional indecencies which we are now witnessing, are due to a lack of appreciation by many otherwise competent lawyers of their social responsibilities. This idea is sometimes expressed by the statement that the practice of law has ceased to be a profession and has become a business. I think this has been partly due to the growing tendency during the last quarter-century of large numbers of the better element in the profession to become specialists in limited areas of the law and thus lose contact with

3. By thus eliminating a large proportion of the unfit, the present excessive number of law students would be reduced and it would be possible to give those admitted to the schools a better training.

the practice in other fields. So, the seeming indifference of many reputable lawyers to the chicanery and malfeasance of other members of the bar may to some extent be due to an unawareness of, rather than to a condonation of actual conditions. Also the traditional loyalty of the attorney to his client has tended to become a loyalty to the client's interests with the result that lawyers rarely regard themselves as being responsible for the social effects of their acts so long as they come within the rules and promote the welfare of their clients. At the same time, I believe that this attitude and the general apathy of lawyers towards the maladjustments of the law, or towards professional misconduct, are in part due to the character of their law school training.

During the last fifty years, legal education has consisted largely in familiarizing the student with rules and principles derived from the cases and statutes, combined with some experience in manipulating them in order to reveal their utility in the accomplishment of desired results. In other words, law has been studied very much as one would study the rules of a game. Little effort has been made to direct the student's attention to the economic, social or political conditions out of which the rules originated, or to the effects of their application in a changing world. The almost complete separation of law from history, from economics and from political science, has not been conducive to an understanding of law as a social institution, nor to an appreciation of the heavy responsibilities assumed by those who participated in its administration. Thus, the practice of law appeared more as a private affair of the lawyer and his client than as a matter of public concern.

It has been my observation that irresponsibility in men is more often due to a failure to appreciate the consequences of their acts than to an indifference to consequences. If this be true, it would seem that there is no surer way of inculcating into prospective members of the bar a sense of public responsibility than by so organizing legal education as to reveal the function of law in society and the social implications of legal rules and legal practices in addition to acquainting the student with lawyers' techniques. Law, thus studied, would bring under consideration the ethical postulates underlying legal rules and practices and would make possible fruitful inquiry into the proper functions of the lawyer, as contrasted with his actual behavior, and would give meaning to the canons of professional ethics.

If we would materially improve the standards of the profession, not only must membership therein be more jealously guarded, but the content of legal education must be so revised as to arouse in the future members of the bar a higher idealism and a greater sense of public responsibility in addition to giving them the technical training which is indispensable to their proper education.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

ABRAHAM LINCOLN: A New Portrait. By Emanuel Hertz, with a foreword by Nicholas Murray Butler. 1931. New York: Horace Liveright, Inc. Vol. I, Pp. xii, 494; Vol. II, Pp. 494-1006.—Here are two large volumes devoted to what the author calls "A New Portrait of Lincoln." It will be more convenient to notice the second volume before the first. That second volume consists of Letters and Documents, arranged for the most part in order of time. There are a number of law pleadings, of no importance to a lawyer, and many other hitherto unpublished documents, some of them important. One document, a letter, said to be dated 1853, to Macedonio Melloni (p. 625), is certainly an impudent imposture and ought not to be countenanced. The lecture on Discoveries and Inventions (p. 796) shows that Lincoln had no knowledge of ancient history except the apocryphal history of the Pentateuch. He evidently believed the fig-leaf story, which even orthodox credulity has now rejected. The original draft of the First Inaugural is printed in full (p. 811). The list of at present inaccessible documents contains a reference (p. 973) to the first draft of Lincoln's reply to the English dispatch to Lord Lyons on the seizure of Mason and Slidell, which is exceedingly important. It may throw new light upon that contested episode. These are a few details regarding a large mass of papers of varying value. There are already four different collections of letters and documents, and this adds a fifth.

The first volume contains what is claimed to be the "New Portrait." There are forty-two chapters in the volume. Each chapter contains an essay on some phase of Lincoln's life or character. It is needless to say that this plan causes useless repetition, and too much "stuffing" in the book is apparent. The opening chapter, "Filling the Gap," gives the elements of this "New Portrait" and there seems to be nothing wanting

except a proper and measured view of Lincoln as a constitutional lawyer of remarkable prescience. But the author's conception of Lincoln has already received the full meed of public approbation. There is nothing "new" about it. The elements of the picture as given, few informed students will now condemn. Most may criticize the judgment of Lincoln as a war strategist, but, as time has gone by, it has become plain that if Lincoln's ideas at the two crucial times of the war, after Antietam and after Gettysburg, had been followed by capacity, celerity and decision on the part of McClellan or Meade, the war would have been shortened. Every one now knows the classic letter to Hooker, but the preposterous Hooker probably was sacrificed by incompetent subordinates. The man, never mentioned in the histories, who threw away the Battle of Chancellorsville, was Devens, who acted through sheer ignorance of what he ought to have done. He survived to be an inferior Attorney General, among so many others of that stamp.

The two chapters, one on the "Legal Phase," the other on "More Than a Country Lawyer," are of interest to lawyers at least; but the author's idea that, because a pleading was signed by Lincoln and some other lawyer, there was a quasi-partnership, cannot for a moment be entertained. This part of the book is disappointing and inadequate. Yet much of the general portrait shows true insight and discrimination. One must, however, frankly say that the whole conception of Lincoln is disfigured by the author's evident belief in a God of "body, parts and passions" who is continually intervening in an Almighty way in human affairs. Good and excellent people in war time are stupid enough to pray to such a God for victory. Such people believe in the passage of the Red Sea, the ingulfing of Pharaoh's army, the forty years in the wilderness, the interviews of Moses with Omnipotence, the stone tables of the law, the standing still of the sun, and the falling of the walls of Jericho. This Hebrew God, who had the Jewish race in his keeping (a sorry mess He made of their affairs), has become a special Union God who took the North into his keeping with more fortunate results. The author thinks that such a God raised up Lincoln and endowed him with supernatural gifts in order to make him the savior of his country. To him Lincoln is like the legendary Moses, he actually talks with God, or sees Him in visions and obtains advice. Hence, the writer has endless passages on Lincoln's divine inspiration, and one frightful chapter, "Moses and Lincoln: A Study in Parallelism," which might just as well have been a parallel between Lincoln and Jack the Giant Killer, so far as actual historical fact is concerned. The whole conception is a fantastic inheritance from uninformed and uncritical times. But for what is good in the book, and there is much that is good, we can be duly thankful, and anyone who reads it will be richly repaid.

Chicago. JOHN M. ZANE.

Report by the Committee to Study Compensation for Automobile Accidents. By Columbia University Council for Research in the Social Sciences. 1932. Philadelphia: International Printing Co.—A committee of distinguished citizens was formed November 15, 1928, which began the study of automobile accidents under the auspices of Columbia and Yale Universities. Shippen Lewis of the Philadelphia bar was chosen Director. The study began in January, 1929, and was carried out in a number of localities by a group of field assistants.

The purpose of the study was the problem of compensation for injuries caused by motor vehicle accidents, rather than the problem of accident prevention.

Cases taken for study were for most part from the public records. They included 8,849 cases from the cities of Boston, New Haven, New York, Philadelphia, San Francisco, Worcester, and from Muncie and Terre Haute, Indiana, rural Connecticut, and San Mateo County, California. The field workers went to each address procured from the public records and got the information directly from the injured person or from a member of the household. In some cases this information was checked at other sources. Court record studies were conducted in Philadelphia, New York, New Haven, Wheeling, Charleston, and Morgantown, West Virginia; Dayton, Ohio; and Detroit. Types of accidents included collisions of automobiles with pedestrians, other vehicles, trains, street cars, and stationary objects. The cases involved persons from many occupational groups. In addition, much information was obtained from insurance organizations and public agencies of all sorts concerned with motor vehicle traffic.

The study of the Committee was motivated by the fact that vehicle accidents in the United States have multiplied over seven times in the last seventeen years. During September, 1931, an average of 110 persons were killed every day. The automobile fatality rate has increased more than 500 per cent. since 1913, while the death rate for other accidents has had a decline of more than 30 per cent. for the same period. In 1930, a total of 33,000 persons were killed and over a million injured by motor vehicles. From 1921 to 1930 the number killed was 300,353.

The problem of compensation for such accidents is one of the major social problems of the day. The motor vehicle accident litigation is the largest single item of litigation throughout the country. During the year 1929 the insurance carriers wrote approximately $255,000,000 in premiums for public liability insurance, and $97,000,000 for property damage liability insurance. Automobile public liability is the most important single line of casualty insurance, with the exception of workmen's compensation.

Personal injuries were made the chief concern of the Committee's studies. The scope of its studies may be indicated by the chapter headings of its report: Chapter 2, Liability Under Existing Law; Chapter 3, Liability Insurance; Chapter 4, How the Present System Distributes Losses; Chapter 6, Financial Responsibility Laws; Chapter 7, Compulsory Liability Insurance; Chapter 8, The Compensation Plan; Chapter 9, Discussion of Compensation Plan; Chapter 10, Constitutionality of Compensation Plan. In addition there is an analysis of the Connecticut case studies; also an appendix made up of numerous tables.

In Chapter 5 the report gives certain statistics derived from the Committee's studies. Among many interesting details it appears that a person injured by an uninsured motorist has a very slight chance of recovering any compensation whatsoever, and practically none recover adequate compensation. Studies from all localities tallied closely on this point. On the other hand, in insured cases, 88 per cent. of the fatal cases, 96 per cent. of the permanent disability cases, and 86 per cent. of the temporary disability cases received some payment. Of the non-insured cases, only 17 per cent. of the fatal cases, 21 per cent. of the perma-

nent disability cases, and 27 per cent. of the temporary disability cases received any payment.

The amounts received in insured cases for temporary disability were ordinarily more than enough to cover the losses, but less than enough in severe injuries and fatal cases. In cases of severe injuries only 4 per cent. of the insured cases were not paid anything, while of the non-insured cases 79 per cent. received nothing. In nearly all of the cases investigated there was no court trial. Many other significant facts are developed in this chapter.

The conclusions of the Committee are brief. One of the most interesting is that the Massachusetts Compulsory Liability Insurance Law is not the failure that it has generally been stated to be. The Committee concludes that it is by far the most advanced step taken in this country to solve the compensation problem. But the Committee believes that we must go farther, and recommends a compensation plan similar to workmen's compensation as the next step, and includes in its report a general outline of the legislation required. The Director formulated and appended a specific draft.

The Committee does not pretend that the study is a thorough one. Perhaps this accounts for the mildness of the report and the note of understatement which runs through it all. It omits many signficant inquiries, such as would indicate the cost of automobile litigation, especially in time and congestion of the trial courts, together with the burdens thrown upon the appellate courts, the cost of witnesses, juries, and all the attendant expense of litigation. It does not mobilize the arguments in behalf of its conclusions, especially as against the present haphazard and crude methods of handling automobile accidents by the courts. The chapter on "Liability Under Existing Law" is a feeble attempt in this direction, but falls so far short of an adequate picture of what is going on in the courthouses of the country that it detracts greatly from the compelling effect the report should have. The subject called for someone near enough the hurly-burly to speak with a vividness, vigorousness, and assurance somewhat in keeping with the opportunity. But the report suffices as a statistical support of what everyone who had given any attention to the general problem had already guessed, and as a considered statement from a group of able men it carries a weight that can not be ignored.

Now the question is, What shall be done with it? There have been reports from committees and commissions of all sorts within the last few years, but little action has taken place to meet the imperfections in our social order which have been disclosed. Here is relatively a small problem that something can be done about and that decisively. The Committee's recommendation of the compensation plan is something that can be acted upon by bar associations, the Commissioners of Uniform State Laws, and other professional and civic groups. Legislatures and legislative committees await workable drafts. As is so well shown in the chapter dealing with the constitutionality of the compensation plan, the Workmen's Compensation Act sets a definite pattern, and its development answers most of the objections which can be raised against the proposed legislation. The report calls for action, which will be welcomed overwhelmingly by the law and professional citizenship of the entire country. The courts have been aggravated by and have in turn aggravated the problem long enough. Insurance plus intelligent informal administration is clearly the way out.

LEON GREEN.
Law School, Northwestern University.

Municipally Owned Electric Utilities in Nebraska. By Paul Jerome Raver and Marion R. Sumner. 1932. Chicago: The Institute for Economic Research. Pp. 61.—This monograph is one of a series of studies in public utility economics, prepared and in preparation under the auspices of the Institute. It includes a history of the municipal ownership movement in Nebraska, a compilation of reasons for ownership status, a digest of pertinent legal and statutory provisions, and a summary.

Nebraska was selected, according to the preface, "because of the comparatively large extent of the municipal ownership movement in that State and because of the relatively complete information available." The preface also warns the reader at the outset that he must draw his own conclusions. The statistics which make up the "history," while painstakingly compiled and analyzed, do not offer much from which such conclusions can be drawn. It appears that the movement reached its peak in 1926, when the State had 282 municipal establishments in existence, thereafter declining to 170 on April 1, 1931; that of 308 municipal establishments since 1886, 138 have changed to private ownership; that this change, as well as the decline in new municipal plants, was roughly correlative with the extension of privately owned transmission lines, making it difficult for the small generating plant to compete with the central distributing station; that up to 1927 municipal plants had, roughly, 20 per cent of the horsepower capacity of all plants in the State, but produced only, roughly, 15 per cent of the total generated output; and that the tendency to purchase rather than generate output has grown stronger during the last five years. Similarly the reasons for preferring municipal to private ownership seem to be identical with those for returning to private management. They include, in both cases, desire for better service, financial inability of both privately owned utility companies and municipalities, dissatisfaction with rates, and the like. Such information, while interesting enough, sheds little light on economic and political backgrounds, industrial development, and other factors which determine popular attitudes toward, and probably the success of, public ownership.

Of more value and certainly of more interest to lawyers is the outline of legal requirements which constitutes one section of the work. Concise and well arranged, with the pertinent constitutional provisions, statutes, and leading cases properly cited, it is an excellent working manual. Incidentally, it discloses that the legislative and judicial policy of the State has been extremely favorable to the development of municipal ownership; and justifies the belief that the decline of recent years must have resulted from other than legal causes.

ANAN RAYMOND.
Chicago.

The Law of Special Assessment and Special Taxation. By George Allen Mason. 5 Vols. 1931. Chicago: Callaghan & Company. Pp. XXXIX, 2358.—This monumental work is a thorough and exhaustive discussion of the whole subject of special assessments in Illinois. In 1898 the writer published a pioneer

work on the same subject, and this present study is based on the earlier treatise, plus some thirty years of practical experience both on the public and the private sides of special assessment litigation.

The result is a series of volumes indispensable to any student of public finance or any lawyer responsible for the conduct of cases. Nothing is lacking in careful and painstaking analysis of every phase of special assessment practice in this state, and for this Mr. Mason makes all students of the subject his heavy debtor.

The present special assessment practice is based, however, on the act of 1897, as amended, and it is earnestly to be hoped that the erudite and experienced Mr. Mason will produce yet another volume, dealing constructively with the broad question of improving the present organization and procedure, and commenting out of the wealth of his experience and reflection on the highest and best uses of the special assessment and tax in our present day system of public finance. To what extent should municipal corporations be given authority to undertake special assessments, for what purposes and with what limitations; and what types of procedure are best designed to make these purposes effective?

These are questions which a benevolent despot would require Mr. Mason to sit down and answer before the season has gone by.

CHARLES E. MERRIAM

Chicago.

An Introduction to British Constitutional Law. By A. Berriedale Keith. 1931. New York: The Oxford University Press. Pp. xii, 243.—Professor Berriedale Keith's little book is new evidence for the fact that only an expert can handle a vast subject in small and intelligent compass. The learned author is among the recognized authorities on British Constitutional Law, and he aims to introduce the beginner to a complicated and confusing branch of law before he begins its detailed study. In addition, the book is meant for the general reader who wishes a view of constitutional law.

Within the scope of less than two hundred and fifty small pages, Professor Keith has succeeded in writing the most balanced and most accurate short book on the subject which has yet appeared. It is significant, too, that the older and somewhat antiquarian discussions about the Crown and parliamentary privileges and such like are reduced to simple proportions to make way for admirable surveys of the organs of the Executive, their functions, their control by legislature and judiciary; and that the whole field has been widened to include the other British Nations and the Mandates. In other words, Professor Keith recognizes that the recent marked growth of interest in constitutional law and the increasing attention which is being paid to it by students and the general public alike are due to social causes—to a sense of its *daily* presence—and he has, with fine instinct, laid emphasis on the present and cast glances into the future. Not that the book is *in vacuo;* for, as in all his writings, the learned author never forgets the historical processes behind all our law. But, the developments are treated with such admirable proportion that the book is a distinct whole, with emphasis where it should be.

In addition, the book is analytical, not descriptive. Fortified by definite references to the important cases, it is a challenge to questions, it suggests problems, it adumbrates changes. We know of no better book, for the young student and for the general reader. It is well indexed. There is a useful bibliography—to which however Mr. O'Briain's book on *The Constitution of the Irish Free State* ought to be added, as well as Mr. Justice Hanna's most valuable *Statute Law of the Irish Free State.*

W. P. M. KENNEDY

Faculty of Law,
University of Toronto

The International Court. By Edward Lindsey. 1931. New York: Thomas Y. Crowell & Co. Pp. xix, 347.—Judge Lindsey has undertaken "to describe intelligibly the essential features of the organization" of the Permanent Court of International Justice, "its methods of work and the functions it may be expected to exercise in connection with international relations." He has succeeded in producing a very readable book, which will prove useful to the general reader though it may not serve the needs of the special student. He does not grapple with the real problems of the Court, nor are they even suggested; and the volume suffers because too frequently the practice of the Court and the history of the period since its creation are neglected.

Two chapters on the rise of international law and on the growth of international society seem to place little emphasis on the remarkable developments of the nineteenth century, particularly in international legislation. This fact may explain the judgment that "international law is more largely based upon custom than upon formal agreement." The description of the Court is largely confined to the history of the drafting of the Statute, and the account of its jurisdiction suffers from a lack of analysis of the texts. Both the advisory opinions and the judgments of the Court are competently summarized, and it is interesting to have the author's judgment that "at last we have a true International Court in operation" whose "work is contributing broadly and vigorously to the development and unification of international law." With reference to the advisory opinion, he concludes that "experience has demonstrated its usefulness and value." But the author will be thought by some people to have leaned backward too far in stating that the Court is "in no sense a part of or dependent on the League of Nations," and his own exposition hardly justifies such a sharp disassociation.

The appendices present the instruments relating to the Court in useful form, though the 1931 edition of the rules might have been substituted for the earlier edition which is given; and clearer indication should have been made as to the extent to which these instruments are in force.

MANLEY O. HUDSON.

Legal Round-up in Oklahoma

(From the Oklahoma City Times, March 16.)

Kidnaped, lost, strayed, stolen or abandoners of the legal profession are nearly 3,240 attorneys who have the right to practice law in Oklahoma but don't do it. "We'll spend a year looking for them," said A. W. Rigsby, state bar secretary.

The supreme court this week has given Rigsby a list of 7,000 barristers, who are on the court's rolls as lawyers. "We have only about 3,800 attorneys on the state bar lists," said Rigsby.

Beginning next month, the bar will publish sections of the 3,240 names, requesting "any persons having information as to whereabouts of these attorneys, please communicate with the state bar." The court's files extend to 1907.

LETTERS OF INTEREST TO THE PROFESSION

Proposed Revision of Bankruptcy Act

EDITOR AMERICAN BAR ASSOCIATION JOURNAL:

The June issue of the Journal contains an article written by Mr. Lloyd K. Garrison, entitled "Proposed Revision of the Bankruptcy Act." Mr. Garrison's article is frankly put forth as a reply to an article written by myself and published in the May number of the Journal. In the main Mr. Garrison's article is merely a restatement of the views and opinions set forth in the Solicitor General's Bankruptcy Report. As I have previously discussed the principal features of the Solicitor General's report I shall not traverse this ground again.

Mr. Garrison loyally supports the basic views set forth at great length in the Solicitor General's report. The fundamental thesis of the Solicitor General is that in the main the disappointing and unsatisfactory results which attend the administration of our bankruptcy law are the consequences of serious defects in the law. That there is a legislative cure for these evils and that he has found it and has embodied it in his bill. That the enactment of his bill will bring about a new order of things where failing debtors will be brought into the bankruptcy courts with their property largely intact and the old troubles and disappointments will in a great measure pass away. This view, I think, is largely based on theoretical ideas which will find little support in the observation and experience of practical men. It is no new discovery that bankrupts generally have little, if any, property left at the time of their bankruptcy. This has been found to be the case in all countries at all times where a state of bankruptcy is recognized by law. These general conditions are the results of deep rooted social and economic causes and can be but slightly remedied by legislation, and so far as I can see will not be improved at all by the proposed new bankruptcy bill.

Quoting from the Solicitor General's Bankruptcy Report, Mr. Garrison says: "As a medium of distribution the Bankruptcy Act has ceased to have any importance to the mercantile community except in a very small percentage of cases." This statement is a mere expression of opinion and it is not necessary to challenge it here. The statement however suggests the practical question: Will the proposed amendments render the Bankruptcy Act a more important and useful "medium of distribution"? In general, the changes in the law which are proposed look to the adoption, in a weakened and modified form, of some of the expedients of the English law. The English law is strictly a "creditors law" and it shows little concern for the rehabilitation of the debtor. The English law is a stringent and drastic law which has "teeth in it," and in a measure renders the undischarged bankrupt a political and commercial outcast. Yet, even when applied in its native vigor the English law yields little, if any, greater dividends to the creditors than our existing law. This statement can be verified by resort to the General Annual Bankruptcy Reports issued by the Board of Trade in London. It is reasonably certain that the pending bill will not improve our existing law as "a medium of distribution."

Mr. Garrison admits that the expenses of administering bankrupt estates are higher in England than under our existing law, but he suggests that this results from the fact that in England the "Board of Trade and the Registrars and official receivers, who are paid by the Board of Trade, together, perform most of the functions of our District Court Judges in bankruptcy, some of the functions of our United States Attorneys and some of the functions of the Attorney General." The result of this, Mr. Garrison says, is that in England expenses are imposed upon bankrupt estates which in this country would be borne by the Government. This suggestion is entirely erroneous and altogether untenable. In England, as here, there are bankruptcy Judges who are paid by the government and not from bankrupt estates. In England, as here, there is a judicial or quasi-judicial officer (called a Registrar in England and a Referee here) who is paid from the funds of bankrupt estates. In England, as here, the expenses of liquidating the estate including the compensation of the liquidator are paid from the bankrupt estate. In England the Board of Trade and its officials perform administrative duties and not judicial duties. But the English law provides for a number of officials, investigators and clerks who administer, investigate and supervise the administration of bankrupt estates and their compensation is a charge upon the estates. This English staff of bankruptcy officials is expensive but more useful than the corps of bankruptcy "Administrators," "Examiners," etc., which the Solicitor General desires to create here, for the English officials administer estates while the officials sought to be introduced into our system would only investigate and compile statistics. There are no material expenses imposed upon bankrupt estates in England that are paid by the Government in the United States.

In my bankruptcy article, I made a tabular comparison of the "approximate" official fees under the existing statute and under the proposed statute. This tabulation is based on the assumption that the estate is "administered in the normal way by a trustee in bankruptcy." Mr. Garrison seems to cast doubt upon the "approximate" correctness of my figures, saying that it is "impossible to check the computations" as trustee's fees under the present act are based "on gross assets which bear no relation to the net available for distribution." But Mr. Garrison's statement is not an accurate one. Under the present act the trustee's compensation is not based "on gross assets" but on the amount of "money disbursed or turned over to any person including lien holders." On the hypothesis stated by me the "official fees under the proposed statute" are susceptible of exact computation, and I think I have computed them correctly. In determining the "approximate official fees under the existing statute," I have assumed that in the case of estates where the distribution to creditors is from $5,000.00 to $500,000.00, inclusive, the administrative expenses would be 20% of the gross amount of money handled, and in the case of a $1,000,000.00 estate would be 10% of the money handled, and have computed the trustee's compensation on the basis of these assumptions. Speaking generally, the assumptions which I have made will render my tabulation of "official fees under the existing statute" too high rather than too low. I think I am justified in asserting that my tabular comparison of fees is "approximately" correct and certainly presents the proposed new scheme of "official fees" in no unfair light.

Mr. Garrison challenges my statement that "it is reasonably certain" that an "authorized trustee will be a collection agent or a 'non-profit trade association' which is merely another name for a collection agency." Few persons who have had an extensive practical knowledge of bankruptcy practice will I think question the correctness of my forecast. Under the proposed bill the trustee is to be appointed by creditors or their proxies. In actual practice this means that the trustee will be appointed by proxies and the proxyholders will generally be collection agents. If a man should happen to be appointed an "authorized trustee" who had no connection, and could form no connection, with a collection agency he would be "out in the cold" and would obtain few, if any, trusteeships.

WALTER D. COLES.

St. Louis, Mo.

Sir Henry Wotton Misquoted

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

I notice that in the address delivered by Hon. W. D. Herridge, on page 251 of the report of the Fifty-fourth Meeting of the American Bar Association he has misquoted Sir Henry Wotton's remarks, and thereby has spoiled one of the most brilliant jests in the English language. What Sir Henry Wotton said was that an ambassador was an honest man sent to lie abroad for the good of his country; and the double meaning of the words "to lie abroad" makes, as I have said, one of the cleverest jests in the English language. As quoted, it is not even an epigram. It is merely a statement of what was a frequent practice in seventeenth century diplomacy.

GEORGE HOADLY.

Cincinnati, March 4.

Alabama

Unprecedented Interest and Attendance at Alabama State Bar Association Meeting

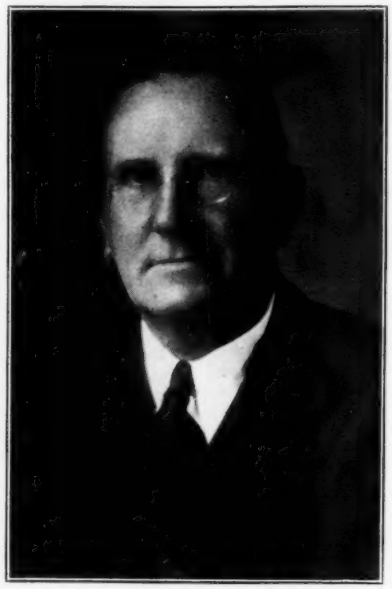
That there is a general and widespread revival of activity and interest in Bar Associations throughout the country was definitely confirmed in Alabama by the unprecedented attendance and interest at the annual meeting of the Alabama Bar Association at Birmingham, Alabama, on April 15 and 16 1932. This renewed interest is generally attributed to the unusual progress and activity of the Birmingham Bar during the past year, the constructive professional legislation at the last legislative session, and to the energy and splendid leadership of the Honorable Borden Burr, President of the Alabama Bar Association for the past year. To his generalship, tireless effort, and diplomacy are due an increased interest in the association's work, progress in every line of activity of the profession, a laying of constructive plans, and the creation of a greater unity among the individuals of the profession. Mr. Burr's services to the Bar cannot be too highly praised.

Between six and seven hundred lawyers attended the two-day session pregnant with interest, instruction and entertainment. About four hundred and fifty guests attended the banquet Friday night at the Tutwiller Hotel for over three hours of delightful entertainment and splendid addresses. A special feature of the entertainment was the rendition by a group of young lawyers of some very clever legal songs, including "The Junior Partners," "Cruel Judge Grimes" and others. Other associations will do well to secure for their meetings these songs from Mr. John D. Black of the Chicago Bar, to whom the Alabama Bar is grateful for his assistance in this respect.

Perhaps the most enjoyable and best attended session was the barbecue on the lawn of Mr. Erskine Ramsay's Red Mountain residence Saturday afternoon from 2 until 6 o'clock. More than six hundred lawyers and their wives spent the whole afternoon dining, dancing and tête-a-têting on the beautiful and spacious grounds. The festivities and music were broadcast over station WAPI of Birmingham.

During the two days various entertainments such as golf, luncheons, sight seeing trips and fraternity and class meetings were provided for those attending. On Friday the Circuit Judges Association, Criminal Law, Aeronautical Law and Equity Procedure sections, visiting ladies, fraternities, etc. had individual luncheons at various hotels. On Saturday morning the visitors were led on an inspection tour of Jefferson County's new $3,000,000 court house, which is said to be second to none in the United States.

The section on Aeronautical Law was directed by Messrs. Douglass Arant and Amzi Barber of the Birmingham Bar. Unexpected interest was expressed in this section. Mr. Arant discussed some of the questions in the law of aeronautics which may confront the average lawyer. Among those problems were the question of ownership of the air space, the right of flight, the liability of an aviator for trespass, jurisdiction over air space as an international problem and as between the several states, the question of nuisance by flight, possibility of tall buildings, smoke stacks etc. as nuisances to flight.



JOHN D. MCQUEEN
President, Alabama Bar Association

Mr. Barber discussed the growth of aeronautical laws in the United States, and suggested a constructive course of legislation to be fostered by the bar.

Mr. Henry S. Drinker of the Philadelphia Bar addressed the association on the subject of Automobile Compensation Insurance. An audience which at the outset was somewhat inclined to laugh at the subject was changed by the masterful presentation of this new idea to an attitude of sympathy if not of approval of this new plan. Mr. Drinker pointed out that this subject is well discussed in a recent issue of the American Bar Association Journal.

The last speaker of the morning session was Mr. A. Leo Oberdorfer of the Birmingham Bar, on the subject of Bankruptcy. Mr. Oberdorfer assailed the recent Bankruptcy Bill of February, 1932, thoroughly dissecting and examining each of its provisions. Hon. E. H. Dryer of Birmingham, Referee in Bankruptcy and co-chairman of the section of bankruptcy, continued the discussion by giving a history of Bankrupt Law and pointing out the deficiencies of the present system. In spite of the fact that Mr. Dryer attacked the parts of the Act which had proven unsatisfactory and suggested changes, nevertheless he took the defense and stated:

"Now I don't pretend, in speaking about the present bankruptcy system, with which I have been working for more than twenty-two years, that it is at all perfect. It has its imperfections, and I will call a few of the principal ones to your attention. But I say this for that law; that, except for the Constitution of the United States, as far as Congress has been willing to permit it to go, it is the ablest legal document in the legislative history of America."

The first speaker at the afternoon session was the Hon. H. F. Crenshaw of the Montgomery Bar, Chairman of the Equity Jurisprudence and Practice section. Mr. Crenshaw announced that a research section had been formed and reported on its proposed program for a reform of some of the obsolete rules and methods of our present equity procedure.

Mr. Robert H. Jackson, of Jamestown, New York, chairman of the Committee on Bar Reorganization of the Conference of Bar Association Delegates, addressed the association on the subject of "An Organized Bar." Mr. Jackson presented the most powerful and stimulating address of the day. He painted an astounding picture of the conditions of the legal profession, particularly of New York. His address was printed in full in the June issue of the American Bar Association Journal.

Mr. Marvin Woodall of the Birmingham Bar reported the progress of the Committee on Illegal Practice of Law. That committee has undoubtedly performed a great service in this field and has already begun to accomplish results in legislation and action. A resolution was read and adopted urging Grand Juries, Solicitors, and the Board of Commissioners to bend their efforts toward breaking up illegal practices under the recent Acts of the Legislature.

The Commercial Law section was directed by Mr. R. DuPont Thompson of the Birmingham Bar. Mr. Thompson gave a gratifying report and delivered an address of much interest, particularly to the commercial practitioner. At the end of this speech a tribute was paid to Mr. Thompson for his splended work as president of the Birmingham Bar Association during the last year.

The Saturday morning session was devoted largely to an open forum which was of great interest and benefit to the attendants. A number of speeches were made by members of the Association, including the Hon. E. H. Cabaniss, Hon. Richard V. Evans, Presiding Judge of the Circuit Court of Jefferson County, Hon. John C. Anderson, Chief Justice of the Supreme Court of Alabama and others. Mr. John McQueen, of the Tuscaloosa Bar was elected president of the State Association for the ensuing year.

The Committee appointed to consider the question of revising and publishing the Alabama Law Journal, headed by Judge J. T. Stockley, made its report, which was unanimously adopted, and the Committee was continued. The report of the Hon. Borden Burr as retir-

ing president of the Alabama Bar Association was then read. After the election of officers and a meeting of the Board of Commissioners, Col. Calvin Goddard and Mr. Leonard Keeler of the Scientific Crime Detection Laboratory of Northwestern University, delivered addresses and demonstrated their equipment to the great interest and amazement of the audience.

The magnificent address of Hon. Guy A. Thompson, was the main feature of the banquet Friday night. His statement of the increase of membership in the American Bar Association during the last year and the progress made by the various sections was extremely gratifying to his listeners. Mr. Thompson discussed the duties of a lawyer to the public and challenged them to greater efforts toward performance of these responsibilities. He ended his splendid address with a beautiful defense and praise of the present Bar.

The annual report of the president, Hon. Borden Burr, was made at the Saturday morning session. This comprehensive address is destined to aid the cause of progress in every field of endeavor of the profession. Mr. Burr pleaded the cause of Criminal Law Reform, advocating a better paid and a more efficient county prosecutor, a transfer of some of the powers of the grand jury to the executive department, equalizing the State's and the defendant's strikes, allowing an appeal to the State, more compulsory jury service, and prevention of jury tampering. In his recommendations for reform of Equity Jurisprudence and Practice Mr. Burr suggested the allowance of oral hearing instead of submission of written testimony and use of special masters, and the denial of right to appeal on rulings on demurrers prior to a final decree. An increase of power of the Bar Commissioners, additional educational qualification for entrance to the Bar, and rigid enforcement of discipline were also advocated.

A proposal was made for definite and thorough organization for reform. Mr. Burr's plan is to increase the terms of the officers and to establish a full time secretary of the Bar Association who will be connected with publishing the Alabama Law Journal and act in supervision of the various research sections, with aid of the faculty of the University of Alabama. The plan of organization of these sections is similar to that recently adopted in California.

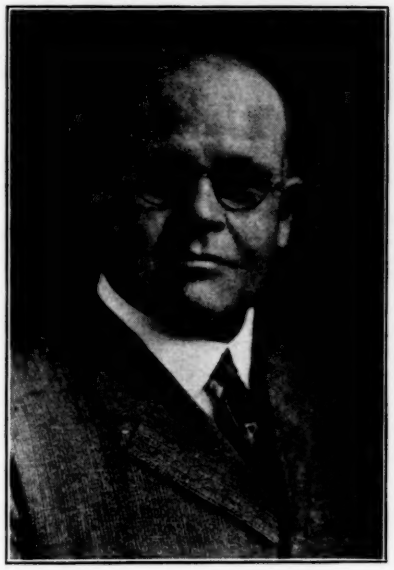
There can be no doubt that the Alabama Bar will see its greatest year in its history during the next twelve months.

RICHARD H. BROWN.

Illinois

Scientific Crime Detection Methods Demonstrated at Illinois State Bar Association's Annual Meeting—Adopts Addition to Canons of Ethics Covering Lawyers in Public Office

The Fifty-sixth Annual Meeting of the Illinois State Bar Association was held in the Hotel Wolford at Danville, June 1, 2 and 3. Despite the financial depression which is causing so many lawyers to occupy themselves either with the difficulties of clients or their own finances, the attendance was a very creditable one. The program set a new high standard for Bar Association activities in Illinois.



JUNE C. SMITH
President, Illinois State Bar Association

President Amos C. Miller's address was devoted to the efforts of the Association during the past year in improving methods of procedure and practice in the Courts. He reported definite progress and prophecies of greater advancement in the near future.

Reports of the Standing Committees gave details of various activities of the Association and covered the whole range of Bar Association work.

Of the three days the first two evenings were devoted to demonstrations of scientific crime detection methods by Lieutenant Colonel Calvin Goddard, Director of the Scientific Crime Detection Laboratory of Northwestern University, and his assistants, Doctor C. W. Muehlberger, Assistant Director of the Laboratory, Captain Seth Wiard, Research Engineer Charles M. Wilson, Research Assistant E. Carleton Hood and Leonarde E. Keeler, Director of the Department of Psychology. On both evenings the room was packed with lawyers eager to note the advanced methods of crime detection and when Mr. Keeler demonstrated the lie detector, the interest was so great that repeated demonstrations were given until after midnight.

The following day Mr. Keeler gave a private demonstration to the members of the Judiciary and almost fifty Supreme, Appellate, Circuit and County Judges were able to examine the device at first hand. In no instance did the detector fail to record the deviation from the truth and during the interim between demonstrations Mr. Keeler assisted the local state's attorney and sheriff in fixing the guilt of two murderers in jail and developing clues which resulted in the arrest of two others in connection with the same crime.

After witnessing the demonstrations it was not difficult to perceive that the day is not far distant when an improved lie detector, in the hands of highly trained specialists, will be relied on as photography and finger prints now are by the Courts.

The special addresses of the convention were of exceptionally high character. Chief Justice John J. Sonsteby of the Municipal Court of Chicago brought a picture of the methods by which over thirty thousand cases were disposed of each month and with a clarity which almost staggered the imagination of the lawyers. His address was well worth the study of any one interested in improving the business methods of Courts.

Dean Harry A. Bigelow of the University of Chicago Law School gave an interesting address upon the subject of legal and pre-legal education, startling many of his listeners with the latest thought on the necessary preparation for the Bar.

The address of Edgar Bronson Tolman, in connection with the report of his Special Committee on the Improvement of Rules of Practice in Trial Courts, gave the Illinois lawyers a vivid picture of their present methods of practice and ways in which it might be improved.

The Committee on Judicial Administration, of which former Justice Floyd E. Thompson of the Illinois Supreme Court is Chairman, has been working for some two years on a proposed Consolidated Civil Practice Act. It has held meetings throughout the State and brought to its assistance the leading students of court practice from the entire country, and as a result it presented its proposed Civil Practice Act. This was discussed for almost a day, section by section, and finally approved by the Association with but three or four votes in the negative. A Committee of seventeen was authorized to present the work during the coming year in an attempt to secure passage of the Act by the Legislature.

Friday, June third, was devoted to a meeting of the delegates of the various Local Bar Associations. Fifty-seven local bar associations sent their delegates, making a body of almost four hundred which discussed the matter of a voluntary, all-inclusive bar association and other subjects.

For fifty-five years the Illinois Bar Association has been a voluntary organization, but membership has been dependent upon the vote of an Admissions Committee, and, therefore, the organization has been selective in its character. By amendments to the By-Laws it was proposed to change this so that the only requirement for admission to the State Bar Association would be determination by the Secretary that the applicant was a lawyer in good standing before the Supreme Court of Illinois, and the payment of dues. However, the majority of members present were of the opinion that the time to make the Association an all-inclusive association had not arrived and the proposition was defeated.

The recent Drainage District scandals developed the fact that so far the American Bar Association has not adopted a Canon of Ethics covering the lawyer in public office, and after con-

siderable discussion the following two Canons, which had been previously adopted by the Chicago Bar Association, were unanimously adopted by the Illinois State Bar Association, to be added to the present Canons of Ethics and to be Canons Number 46 and 47:

Professional Representation of Governmental Bodies

"A lawyer who receives a salary from the State, or from a municipal corporation or other governmental body, has no right to keep monies so paid him without rendering adequate service therefor. Such salaries cannot be deemed a retainer. When it clearly appears that the salary so received exceeds the value of the services rendered, the lawyer is under obligation to return the excess.

"It is the duty of a lawyer who is attorney for the State or for a municipal corporation or other governmental body not to acquiesce in the wrongful diversion of its funds, and the duty is the more imperative when the diversion is made possible by his official act or failure to act.

"The professional obligations of any lawyer representing the public are to be measured by the same high standards as those governing his professional conduct in private practice, and are not to be limited either by the traditions or exigencies of the political situation, or by the demands or dictates of any party organization."

The Lawyer in Public Office

"When a lawyer is elected to the legislature, or to an executive or other public office of any kind, or holds any public employment, by appointment or election, his duty as the holder of such office or employment requires him to represent the public with undivided fidelity. His obligation as a lawyer (with which we are here concerned) continues; as an example, it is improper for him, as for any other lawyer, to represent conflicting interests, and therefore it is improper for him to act professionally for any person or corporation, including a municipal corporation, or for any other private or public body which is actively or specially interested in the promotion or defeat of legislative or other matters proposed or pending before the public body of which he is a member or by which he is employed, or before him as the holder of a public office or employment. The principle is not that these interests do necessarily conflict, but that they may conflict; no lawyer (say the courts), having duties to perform of a fiduciary nature, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. There are other applications of the code of legal ethics to the special case of a lawyer in public office, but it is unnecessary to detail them. These are over and above the duties which are not peculiar to lawyers, but which apply equally to laymen in public office; such as the duty to preserve the legislative branch free and independent of control by the executive, an independence which can scarcely be maintained if a considerable number of members of the legislature are in receipt of salaries from employment in the gift of public offices or boards, local, state or federal; for it is to them that the member may feel responsible for his conduct in office, and he may look to them for direction and advancement, passing over the public, the true and ultimate source of his authority. These are considerations which the lawyer in public office, above all men, should have at heart; and in failing to observe them he is recreant not only as one in public office or employment, but also to his professional obligations as a lawyer."

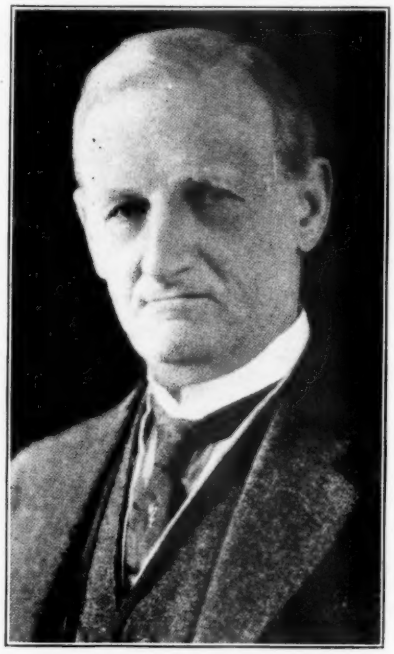
Solicitor General Thomas D. Thacher was the guest speaker at the Annual Dinner and presented to the members his views upon the amendments to the Bankruptcy Act permitting the Federal Courts to reorganize business corporations. It was a scholarly presentation of a very difficult subject and the Solicitor General left many friends by reason thereof in the Bar of Illinois when he departed for Washington.

According to the custom of the Association, election was by mail and over a thousand ballots were cast for the various officers, resulting in the following election: President, June C. Smith, Centralia; Vice-Presidents—R. V. Fletcher of Chicago, James S. Baldwin of Decatur, Floyd E. Thompson of Chicago; Secretary, R. Allan Stephens, Springfield; Treasurer, Frank L. Trutter, Springfield; Member of the Board of Governors (at large), Sumner S. Anderson of Charleston and Laird Bell of Chicago.

This year petitions were filed for recommendations for Illinois officers of the American Bar Association and seven candidates were voted on for members of the Local Council. About six hundred members of the American Bar Association expressed their requests that the following officers be elected by the American Bar Association to represent Illinois: Member of General Council from Illinois, Edward W. Everett, Chicago; Vice-President from Illinois, Leon Green, Chicago; Members of Local Council for Illinois—Frank T. Miller of Peoria; James J. Barbour of Chicago, Clarence P. Denning of Chicago and Walter F. Dodd of Chicago.

R. ALLAN STEPHENS, Secretary.

Texas



HARRY P. LAWTHER
President, Texas Bar Association

Fifty-first Annual Meeting of the Texas Bar Association—Legislation to Prevent Unlawful Practice of Law Favored—Higher Admission Requirements Approved

The Fifty-First annual meeting of the Texas Bar Association was held at Mineral Wells on May 19, 20 and 21. Three hundred and seventy-five members of the Association registered at the meeting, and it was observed that the majority of those attending did not come from any one locality, as is frequently the case when the Association meets in a large city, but practically every section of the State was well represented.

The business sessions were well attended, there being practically no time at which there were not at least two hundred and fifty members present. It is believed that this unusually good attendance and interest in the business meetings was due, in no small degree, to the fact that much of the time of the Association was devoted to the discussion of problems of vital present-day interest.

The Self-Governing Bar Bill, which has been sponsored by the Association for several years, was most ably discussed by Mr. Harry P. Lawther, of Dallas, Chairman of the Special Committee on that measure, and he was op-

posed by Mr. W. P. McLean, of Ft. Worth. A vote being taken upon the endorsement of the bill and report of the committee, with a full attendance present, there were only two "noes" and the special committee, with Mr. Lawther in charge, was continued, with instructions again to urge the adoption of this bill at the next session of the Legislature. In connection with this discussion, Hon. J. R. Keaton, Past President of the Bar Association of Oklahoma, delivered a most instructive address on the Self-Governing Bar Act of Oklahoma, and how it operates and functions.

An extended discussion was provoked by the report of the Committee on Legal Education and Admission to the Bar, of which Hon. Robert W. Stayton, of Austin, was Chairman. The committee recommended legislation drastically increasing the restrictions for admission to the Bar of Texas. The resolution was adopted by the Association and was referred to the Legislative Committee.

Hon. Henry P. Burney, of San Antonio, Director of the Association, delivered a report on Lay and Corporate Encroachment on the Practice of the Law, and enumerated the almost endless ways in which the practice of the law is encroached upon today by laymen and corporations. Mr. Burney's resolution with respect to appropriate legislation to prohibit these practices, was adopted and referred to the Legislative Committee.

Principal addresses were delivered by Hon. Martin W. Littleton, of New York City, and by Hon. Guy A. Thompson, President of the American Bar Association. Mr. Littleton's address was entitled "What Price Progress," and was delivered before an audience of several thousand persons at the City Auditorium. Mr. Thompson's address was considered of such interest to the profession, that it was voted to have it printed and distributed to the entire Bar of Texas.

An old fashioned chicken barbecue was given at Camp Wolters, at which more than seven hundred chickens were consumed.

The meeting concluded with the annual banquet. Speakers at the banquet included Mr. Sidney Samuels of Ft. Worth, Judge R. Walker Hall of Amarillo, Mr. John T. Ranspot of Mineral Wells, and Mr. Thompson and Mr. Littleton.

Mr. Harry P. Lawther, of Dallas, was unanimously elected President of the Association. Judge E. L. Klett, of Lubbock, was elected Vice-President and George C. Gaines, Jr., of Houston, was re-elected Secretary. The Directors elected for the ensuing year are: Messrs. H. F. Montgomery, of Houston; J. H. Barwise, of Ft. Worth; Ben H. Powell, of Austin; Henry P. Burney, of San Antonio; C. T. Freeman, of Sherman; Will C. Hurst, of Longview; H. C. Pipkin, of Amarillo; R. A. D. Morton, of El Paso; Charles T. Butler, of Beaumont; James P. Alexander, of Waco, and Thomas R. Smith, of Colorado. Mr. H. C. Pipkin, of Amarillo, was chosen Chairman of the Board of Directors.

It was generally conceded by all in attendance that this meeting, from the standpoint of attendance, interest, entertainment and constructive achievement, ranks high in the annals of the Association.

GEORGE C. GAINES, JR., Secretary.

First District Association Organized Under New Constitution of Texas Bar Association

On May 7th, 1932, a meeting was held in Houston to organize the Bar Association for the First Supreme Judicial District of Texas. At the last annual meeting the Constitution of the Texas Bar Association was amended to provide for eleven district associations; this being the first one organized under that Constitution. The district is composed of twenty counties surrounding Houston and Galveston in Southwest Texas. Approximately one hundred and fifty lawyers attended the organization meeting, representing eleven of the twenty counties in the district.

The following officers were elected: D. A. Simmons, Houston, President; Bryan F. Williams, Galveston, Vice-President; Ira J. Allen, Houston, Secretary-Treasurer.

Twelve directors were elected, as follows: Owen D. Parker, Ballinger Mills and Henry W. Flagg, Galveston; W. C. Campbell, Palestine; Carlos B. Masterson, Angleton; D. R. Peareson, Richmond; C. C. Ingram, Wharton; Palmer Hutcheson, Larry W. Morris, Wright Morrow, R. Wayne Lawler and George E. B. Peddy, Houston.

The district meeting was called and presided over by John L. Darrouzet, President of the Galveston County Bar Association, since W. L. Cook, the director of the state bar association for the district, had recently died.

H. F. Montgomery of Houston was chosen to represent the district on the Board of Directors of the Texas Bar Association.

Talks were made by James V. Allred, Attorney General of Texas, and R. A. Pleasants, Chief Justice of the Court of Civil Appeals for the district.

DAVID S. DAY
President, Connecticut Bar Association

Roll of Honor

MEMBERSHIP CAMPAIGN 1932

[This list includes all members who have secured applications from May 13th to June 6th, inclusive.]

California
Bledsoe, Benjamin F., Los Angeles.
Farrand, George E., Los Angeles.

Colorado
Bosworth, Robert G., Denver.
Shaforth, Will, Denver.

Connecticut
Corbin, Arthur L., Jr., New Haven.
Pettengill, Charles W., Greenwich.
Robinson, Thomas R., New Haven.
Smith, Allan K., Hartford.

District of Columbia
Fegan, Hugh J., Washington.
Stone, J. Austin, Washington.

Florida
Knight, Dewey, Miami.
Thompson, Arthur R., St. Petersburg.

Illinois
Jones, W. Clyde, Chicago.
Pringle, F. W., Chicago.

Indiana
Barnes, Earl B., Indianapolis.

Iowa
Kass, W. J., Sioux City.

Kentucky
Lazarus, Joseph, Louisville.

Louisiana
Hawthorn, J. W., Alexandria.
Madison, George T., Bastrop.

Maryland
Carman, Robert R., Baltimore.
Shehan, William Mason, Easton.

Massachusetts
Howard, Nelson W., Boston.
Mahoney, James P., Lynn.
Pakulski, H. Murray, Boston.
Sullivan, James W., Lynn.

Minnesota
Stone, Ralph A., St. Paul.

Missouri
Barrett, Jesse W., St. Louis.
Goodbar, Alvan J., St. Louis.
Long, Joseph R., Jr., St. Louis.
Mayne, Walter R., St. Louis.
Overstreet, Lee-Carl, Columbia.
Poulton, Ellison A., St. Louis.
Stewart, Gladys B., Ava.
Thompson, Guy A., St. Louis.

Nebraska
Bockes, Thomas W., Omaha.
O'Sullivan, Eugene D., Omaha.

New Hampshire
Broderick, James A., Manchester.

New Jersey
Ashmead, J. Edward, Newark.
Kristeller, Lionel P., Newark.

New York
McCullen, Edward J., New York City.
Shay, Percy A., New York City.
Williams, Henry D., New York City.
Williams, Paul, New York City.
Woodson, Fred Lee, New York City.

Ohio
Dineen, John, Dayton.
Elliff, Charles W., Dayton.
Guinther, Robert, Akron.
Harlor, John C., Columbus.
Howland, Paul, Cleveland.
Rector, Fred C., Toledo.
Rockwell, F. J., Akron.

Oklahoma
McKnight, Louie E., Enid.
Sutherland, G. K., Hominy.
Trumbo, Donald, Muskogee.

Oregon
Kanzler, Jacob, Portland.
Womersley, Charles E., Portland.

Pennsylvania
Brobst, Albert W., Wilkes-Barre.
Granger, Percival H., Philadelphia.
Hargest, William M., Harrisburg.
Little, Charles B., Scranton.

South Carolina
Tobias, Ashley C., Jr., Columbia.

Texas
Humphrey, Leslie, Wichita Falls.
Johnson, Ray C., Amarillo.
Masterson, Carlos B., Angleton.
Sanford, A. D., Waco.
Stone, Ben H., Amarillo.
Williams, W. Erskine, Fort Worth.

Washington
Cohen, Arthur G., Seattle.
Hamblen, Laurence R., Spokane.
Hilen, A. R., Seattle.
Russell, Antone E., Spokane.

West Virginia
Hoffheimer, George M., Clarksburg.

Wisconsin
Duffy, F. Ryan, Fond du Lac.
Fisher, William E., Stevens Point.

APPLICATION FOR MEMBERSHIP

To the American Bar Association,
1140 North Dearborn Street, Chicago, Illinois.

I hereby make application for membership in the Association.

(a) I have been since the year.....a member in good standing of the Bar of the State (or States) of

.....

I am a member of the following Associations of the Bar.....

(b) I am White ☐ Indian ☐ Mongolian ☐ Negro ☐

NAME .....

MAILING ADDRESS .....

CITY and STATE.....

Endorsed by .....Address .....

Check to the order of American Bar Association for $.....is attached.

Annual dues are $8.00. If this application is made between July 1 and September 30, the check should be for $8.00; if between October 1 and December 31, for $6.00; if between January 1 and March 31, for $4.00, and if between April 1 and June 30, for $2.00.

A member receives the monthly American Bar Association Journal beginning with the month of his election, and the report of the annual meeting of the Association. This report is a record of the activities of the Association and contains a list of the members.